ENDANGERED SPECIES ACT AMENDMENTS OF 1982

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION

OF THE

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

S. 2309

A BILL TO AMEND THE ENDANGERED SPECIES ACT OF 1973, TO AUTHORIZE FUNDS FOR FISCAL YEAR 1983, AND FOR OTHER PURPOSES

APRIL 19 AND 22, 1982

SERIAL NO. 97-H46

Printed for the use of the Committee on Environment and Public Works

U.S. GOVERNMENT PRINTING OFFICE
94-015 O WASHINGTON : 1982

S321-30

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

ROBERT T. STAFFORD, Vermont, *Chairman*

HOWARD H. BAKER, Jr., Tennessee
PETE V. DOMENICI, New Mexico
JOHN H. CHAFEE, Rhode Island
ALAN K. SIMPSON, Wyoming
JAMES ABDNOR, South Dakota
STEVE SYMMS, Idaho
SLADE GORTON, Washington
FRANK H. MURKOWSKI, Alaska

JENNINGS RANDOLPH, West Virginia
LLOYD BENTSEN, Texas
QUENTIN N. BURDICK, North Dakota
GARY HART, Colorado
DANIEL PATRICK MOYNIHAN, New York
GEORGE J. MITCHELL, Maine
MAX BAUCUS, Montana

BAILEY GUARD, *Staff Director*
JOHN W. YAGO, Jr., *Minority Staff Director*

SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION

JOHN H. CHAFEE, Rhode Island, *Chairman*

ALAN K. SIMPSON, Wyoming
STEVE SYMMS, Idaho
SLADE GORTON, Washington

GEORGE J. MITCHELL, Maine
GARY HART, Colorado
DANIEL PATRICK MOYNIHAN, New York

CONTENTS

OPENING STATEMENTS

Page
Chafee, Hon. John H., U.S. Senator from the State of Rhode Island 1, 187
Gorton, Hon. Slade, U.S. Senator from the State of Washington 2
Mitchell, Hon. George J., U.S. Senator from the State of Maine 2
Simpson, Hon. Alan K., U.S. Senator from the State of Wyoming 187

WITNESSES

Arnett, G. Ray, Assistant Secretary for Fish, Wildlife and Parks, Department of the Interior, accompanied by Ron Lambertson, Associate Director for Federal Assistance 3
  Prepared statement 46
Bean, Michael, Environmental Defense Fund 210
  Prepared statement 345
Berlin, Kenneth, National Audubon Society 216
  Prepared statement 409
Blair, William D., Jr., president, the Nature Conservancy 25
  Prepared statement 93
Boynton, Steve, American Fur Resources Institute 41
  Prepared statement 137
Campbell, Faith, Natural Resources Defense Council 30
  Prepared statement 100
Carlton, Robert, National Forest Products Association 207
  Prepared statement 317
Colson, David, Assistant Legal Adviser, Oceans, International Environmental and Scientific Affairs, Department of State 18
  Prepared statement 67
Fischer, Roland C., Colorado River Water Conservation District 191
  Prepared statement 230
Grandy, John, The Humane Society of the United States 32
  Prepared statement 109
Haggard, Jerry L., American Mining Congress 213
  Prepared statement 371
Huey, William S., secretary, New Mexico Natural Resources Department, representing International Association of Fish and Wildlife Agencies 21
  Prepared statement 76
Parenteau, Patrick, National Wildlife Federation 196
  Prepared statement 241
Smelser, Duane, Safari Club International 43
  Prepared statement 143
Stevens, Christine, Society for Animal Protective Legislation 35
  Prepared statement 133
Stevenson, William, Deputy Assistant Administrator for Fisheries, NOAA, Department of Commerce 14
  Prepared statement 60
Tate, Dr. James, Western Regional Council 188
  Prepared statement 222
Tucker, W. Samuel and John Cagnetta, Edison Electric Institute 204
  Prepared statements 263, 276
Williamson, Lonnie, secretary, Wildlife Management Institute 24

ADDITIONAL MATERIAL

Page

S. 2309 163

Statements:

- American Fur Industry, Inc 440
- Cayman Islands, Government of 447
- Colorado Department of Natural Resources 437
- Garden Club of America 455
- National Cattlemen's Association 458
- National Snarecroppers Fund 460
- Natural Areas Association 467
- Northeast Utilities 293
- TRAFFIC (USA) 470
- Western States Water Council 482

ENDANGERED SPECIES ACT AMENDMENTS OF 1982

MONDAY, APRIL 19, 1982

U.S. SENATE,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION,
Washington, D.C.

The subcommittee met at 10 a.m., in room 4200, Dirksen Senate Office Building, Hon. John Chafee (chairman of the subcommittee) presiding.

Present: Senators Chafee, Gorton, and Mitchell.

OPENING STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator CHAFEE. Good morning, ladies and gentlemen. I want to welcome everyone to the hearings on the Endangered Species Act Amendments of 1982, the amendments which I introduced on behalf of myself and Senators Gorton and Mitchell. This is S. 2309, formally known as a bill to reauthorize appropriations for the Endangered Species Act of 1973. I want to thank my colleagues for their interest and valuable assistance.

The timely reauthorization of a strong Endangered Species Act is one of my top priorities as subcommittee chairman for this session of Congress. To be timely, the bill must be reported by the full committee no later than May 15. So we have to move along. And it has to be signed by the President no later than September 30 of this year. I am confident that we can meet these deadlines.

On December 8 and 12 of last year we held 2 days of oversight hearings to review the act. A number of concerns were identified at those hearings. Among them were the conflicts that were created by introduced or experimental populations of endangered species; second, suggestions that the section 4 listing process and the section 7 exemption process are too cumbersome; third, the uncertainties associated with the extended section 7 consultation; fourth, confusion as to the relationship between section 7 and findings of no jeopardy and the section 9 prohibitions of takings; and fifth, a difference of opinion over how best to protect species, including bobcats, as a result of CITES.

We spent the next several months meeting with interested people and working on solutions to these problems. In addition to reauthorizing appropriations for 3 years, the bill that Senators Mitchell, Gorton and I have introduced includes amendments that are proposed solutions. I encourage witnesses to present constructive criticism and specific suggestions today and Thursday. We just can't spend time with people being critical. If they have suggestions, let's have them.

It is my belief that S. 2309 maintains the integrity of the Endangered Species Act, and I would remind proponents of further changes that they, too, must maintain the integrity of the act if they expect us to favorably consider their proposals.

As I have said several times since the December hearings, it is time we raised the level of debate about this law to the arena of facts and intellectually honest discussion. Too often the debate has centered around arguments based on emotionalism and undocumented fear. The burden of proof is on those who want to see further changes.

On February 8 of this year I received a letter from Secretary Watt in which he agreed with my position that no major changes are needed in the act this year. He suggested that the Assistant Secretary for Fish, Wildlife and Parks be made available to assist us in drafting a reauthorization bill. We accepted that offer of assistance, and I would like to thank the Secretary, Assistant Secretary Ray Arnett, who is here today, Deputy Assistant Secretary Craig Potter, also here, and Secretary Jantzen and Ron Lambertson and the many other dedicated professionals within the Department of the Interior for their cooperation and valuable advice.

Senator Gorton has been delayed but will be here shortly. I will enter his statement at this point in the record.

OPENING STATEMENT OF HON. SLADE GORTON, U.S. SENATOR FROM THE STATE OF WASHINGTON

Senator GORTON. I am pleased to be here today to begin hearing on the Endangered Species Act reauthorization process. Many issues of concern were identified in the oversight hearing last year, and many of these have been addressed in S. 2309, which I have cosponsored. I have read the testimony submitted for today's hearing, and already many constructive suggestions for improvement in the reauthorization bill have been forthcoming. I look forward to today and Thursday's hearings as a opportunity to become even more familiar with the concerns of affected groups in the operation of this important piece of environmental legislation.

OPENING STATEMENT OF HON. GEORGE J. MITCHELL, U.S. SENATOR FROM THE STATE OF MAINE

Mr. MITCHELL. The legislation we are considering today is in keeping with my commitment to maintain strong protection for endangered and threatened species of wildlife, and I am happy to be a cosponsor of this measure. The bill reflects the importance of the Endangered Species Act. That act, like other landmark environmental and conservation laws, has widespread support in my State of Maine and throughout the Nation. And the United States, because of the protection it affords endangered species, is looked to as an example for other nations throughout the world. the measure before us, S. 2309, should not, and I believe does not, detract from this country's obligations to help save wildlife that is on the brink of extinction.

The need to protect endangered species becomes more crucial with each passing year. It is estimated that as many as one to three species per day are becoming extinct. That rate may increase to one per hour by the end of this decade. By the year 2000 we may have lost as many as 20 percent of all life forms on earth.

Perhaps we will neither notice nor miss many of the species or their genetic material that is forever lost to us. But that is not a risk I am willing to take. Surely our lives would be diminished esthetically by the loss of the eagle or the grizzly bear. An our lives would be diminished materially by the loss of the evening primrose with its hoped for application to coronary heart disease, arthritis or eczema, or the loss of the rare Mexican perennial grass which may provide us with perennial corn. Nearly 40 percent of the world's medicines are derived from plant and wildlife species. Extracts from more than 500 species of marine invertebrates could have anticancer effects. I for one am not pepared to choose which of these species we can do without. Nor would I prejudge the value of other species whose importance is as yet unknown.

S. 2309 maintains the integrity of the Endangered Species Act. It would encourage the listing of species that are endangered or threatened, and the establishment of new or experimental populations of endangered species. The bill streamlines the section 7 exemption process and eliminates the statutory conflict between sections 7 and 9 of the act. It would also encourage the listings of species that are endangered or threatened. I am satisfied that these and other provisions make the act more sensible and workable in its application while continuing its primary purpose, strong protection for endangered species.

Senator Chafee. The first panel will consist of the Assistant Secretary for Fish, Wildlife and Parks, a gentleman with great experience in this area and certainly a well-known friend of mine, Ray Arnett, whom we welcome here; William Stevenson, Deputy Assistant Administrator for Fisheries, NOAA; and David Colson, Assistant Legal Advisor at the State Department for Oceans, International Environmental and Scientific Affairs.

Mr. Arnett, we know you have an engagement. Each of you gentlemen have testimony which we will enter in the record. If you would like to summarize it, that would be perfectly all right with me. So, Mr. Arnett, why don't you proceed. We welcome you here.

STATEMENTS OF G. RAY ARNETT, ASSISTANT SECRETARY FOR FISH, WILDLIFE AND PARKS, DEPARTMENT OF THE INTERIOR, ACCOMPANIED BY RON LAMBERTSON, ASSOCIATE DIRECTOR FOR FEDERAL ASSISTANCE; WILLIAM STEVENSON, DEPUTY ASSISTANT ADMINISTRATOR FOR FISHERIES, NOAA, DEPARTMENT OF COMMERCE; AND DAVID COLSON, ASSISTANT LEGAL ADVISER, OCEANS, INTERNATIONAL ENVIRONMENTAL AND SCIENTIFIC AFFAIRS, DEPARTMENT OF STATE

Mr. Arnett. Thank you, Senator. It is a pleasure for me to be here.

I first want to express my appreciation to you and particularly to Senator Gorton and Senator Mitchell for cosponsoring this bill and the tremendous help we have received from all of you and your staff.

As you pointed out, the statement that I have is rather lengthy. I would like your permission to introduce that into the record for deliberation by people who want to read it in detail and to present to you a short statement at this time, if that is acceptable.

Senator CHAFEE. Fine. Go ahead.

Mr. ARNETT. You did introduce and I do have other members of the staff here to answer technical questions. We do have our Special Assistant who has been working on this, Craig Potter, and Dr. Hester, who is the Deputy Director for Fish and Wildlife, and Ron Lambertson, Associate Director for Federal Assistance, and the endangered species problems come under his jurisdiction. They do have the expertise and the technical knowledge to assist you in any way you would like.

Before discussing S. 2309, I would like to mention briefly that the Fish and Wildlife Service is moving ahead with its administrative efforts to improve implementation of the act. The Service has submitted to OMB a regulatory revision work plan which delineates a specific timetable that the Service will follow in implementing needed regulatory changes. After they are in place, we will be back to you with an evaluation of these efforts. We want to exhaust every possible administrative remedy before we ask Congress to make major further legislative changes in the act.

Turning to the act itself, S. 2309, one of the most effective measures that can be taken to insure recovery of a species is reintroduction into the historical range. Section 2 of S. 2309 addresses problems that we now have in trying to reintroduce species by creating a new category of experimental populations under the act. By authorizing the Secretary to issue special regulations for these species, the bill would give us the flexibility to address concerns that State and Federal land managers now have about the effects of such introductions on the management of these areas.

While section 2 of S. 2309 does not specifically address the application of section 9 of the Endangered Species Act to experimental populations, we assume that the Secretary would be able to apply or waive the provisions of section 9 under the regulatory authority provided in section 2. We would promulgate such regulations at the time the experimental population is established.

It would also be helpful to have some clarification as to what constitutes nonessential experimental populations under section 2(b).

Now, section 4 consolidates and revises the current process for listing species and determining critical habitat. We support efforts to streamline the process and would like to offer several comments along that line.

Section 4(5) of S. 2309 requires the Secretary to determine critical habitat concurrent with listing to the maximum extent prudent and determinable. We are unclear as to the intended interpretation of "determinable." We are also unclear as to what happens if we do not issue regulations concurrently with listing threatened species. Are we precluded from proceeding with the listing or from issuing regulations at some later date? Well, such an interpretation would have a serious adverse impact on our program. So we believe clarification would be helpful.

With regard to section 4(6), which deals with petitions, it would be helpful to have report language that specifies first off that this provision is not intended to affect our priority system; and, second, if the Secretary determines within 12 months that he will not at that time proceed with the listing because it is not a high priority, he may still proceed with the proposal at some future appropriate time.

We recommend that paragraph 4(b)(2), requiring a review of other organizations' candidate lists, be deleted because it simply duplicates the existing petition process.

Finally, we have found the status review process to be a useful tool in making initial determinations on the list of species, and we recommend that it be retained in section 4(b)(1).

The next set of major changes made by S. 2309 is to the Section 7 exemption process. We believe that overall these changes are definite improvements over the existing law. We do, however, have several issues which we would like to address.

Section 5(b)(7)(A) reduces the time available to conduct the study and issue the report. The time available is reduced from 180 days to 150 days. We are concerned this will impede the ability of the Secretary to prepare the report without expediting the exemption process significantly. We would recommend an alternative that would take only a total of 210 days while imposing a slightly less restrictive deadline on preparation of the report. This would be 20 days for the threshold decision, 180 days for the report, and 10 days for the ESC decision—a total of 210 days, as I say.

We also recommend that the determination regarding irreversibility and irretrievability of commitment of resources be retained as a threshold decision.

Section 5(b)(2)(C) of S. 2309 does not address a possible conflict-of-interest situation that may exist when either NMFS or WFS renders a jeopardy opinion for an action conducted by an agency of the other department. We believe that the provision of new paragraph 7(g)(1)(B) providing for a joint report should be extended to such situations.

So, in closing, a brief comment on CITES implementation. While we support the approach taken by S. 2309 in dealing with the bobcat problem, we feel that the standard of "best available biological information derived from reliable wildlife management practices" is still somewhat vague, and we would recommend that this change be made to "best available biological information utilized in professionally accepted wildlife management practices."

That concludes my statement at this time, Senator Chafee, and while we have made some recommendations concerning clarifying language, on the whole, the administration is heartily in support of your bill and we support the approach that it is moving towards and look forward to working further to clarify any things as we move down the path to come up with a bill that everyone hopefully can support.

Senator CHAFEE. Thank you, Mr. Arnett.

Now, as I understand it, most of the points you raised here were points that can be resolved in report language. In your concluding statement you stated that you support it. Could you review that once again?

Mr. ARNETT. Yes, sir. Off the top of the head, but basically the administration is very supportive of the method in which you are carrying this bill forward, the changes you are trying to make to make it more reasonable and easier to work with, because we are very supportive of endangered species types of legislation that will do the things that we are hoping will come out of this bill that you have proposed.

Senator CHAFEE. As you know, we go for a 3-year authorization.

Mr. ARNETT. Yes, sir. We pointed out before, I said basically we are in support of your bill, not totally.

Senator CHAFEE. We want you totally.

Mr. ARNETT. I know, sir. I would like to be totally. If you would change it to a year, we would get closer.

Senator CHAFEE. A year is a waste of time. Why a year? What do we gain by a year?

Mr. ARNETT. I think in a year——

Senator CHAFEE. You folks have been in office for 2 years. What are you going to know in one more year?

Mr. ARNETT. It has taken us 1 year to find the key to the outhouse.

Senator CHAFEE. If you move that slowly, we will never get anything done around here. (Laughter)

Mr. ARNETT. We do hope to be able in that year, sir, to exhaust every administrative act or ability that we have. I don't think that has been done in the past. The Fish and Wildlife Service has been moving very rapidly in this area. I think within a year's time we will be able to say which of those administrative and regulatory changes that can be made without legislation are appropriate. And the ones then in a year's time that perhaps need legislative change, at that time we will be prepared to give you a detailed package on what we consider to be improvements in the legislative area.

Senator CHAFEE. You can always come up with suggestions. We will be around.

Mr. ARNETT. I hope so.

Senator CHAFEE. I hope so, too.

Let me ask you about the exemption process that we have set up here. First of all, we shorten it to 200 days from the date of application instead of the current 360 days. You came up with a figure of 210, I believe.

Mr. ARNETT. Yes, sir. Again to reiterate that portion for you, I think it was on page 3 of my short testimony, we recommended 210 days. It would be 20 days for the threshold decision, 180 days for the report to be conducted, and then 10 days for the ESC decision to be made. That would give us a total of 210 days.

We have people that have to make that report with us here with PBA. If you would like some further clarification, I would be glad to ask one of those individuals to assist you.

Senator CHAFEE. The CITES problem that you mentioned, the language we have deals with the best available biological information derived from reliable wildlife management practices. Now, what was the language that you were anxious to have in there?

Mr. Arnett. Sir, what we would like to have in there would be the best available biological information utilized in professionally accepted wildlife management practices.

The purpose for that, sir, is the language you have in there, "reliable," could result in additional court disputes as to its interpretation, we feel, because "reliable" means different things to different people. I guess you could ask is 55 percent reliable or is 95 percent reliable? Our term "professionally accepted" means to require that those methods and information which are used by professional managers today, they are understood by professional managers and wildlife people, is much more clearly definitive of what we are attempting to get at.

Senator Chafee. Does your language appear anywhere else in statutes? Does that give us anything to go by? Are there court decisions in any way on your language?

Mr. Arnett. I don't believe so. I would like to refer that to Mr. Lambertson.

Could you answer that specifically, Ron?

Senator Chafee. What do we gain with your language?

Mr. Lambertson. That concept was borrowed from the Federal Aid Act where we used a concept very similar to that to measure the programs the States have been conducting in the wildlife area for about 30 years.

Mr. Arnett. Thank you, Ron.

Senator Chafee. My time is up. I might come back. I will go on to Senator Gorton, whom we welcome here, a coauthor of these amendments.

Senator Gorton. I will ask Mr. Arnett one multiple question. Since what you describe as your new process began, how many new listings have there been, how many delistings have there been, and how many would you expect in the next 3 to 6 months?

Mr. Arnett. May I ask a professional staff member to answer that for you, please? Ron?

Senator Gorton. Yes.

Senator Chafee. Could you just read that question back? I missed the question. Or if you would repeat it, Senator.

Senator Gorton. Since what they describe as their new process has begun, how many new listings have been made, how many delistings have been made, and how many more of each do they expect in the next 3 to 6 months.

Senator Chafee. Thank you.

Mr. Lambertson. By the new process, I assume you mean since the 1979 amendments, 1978 amendments, when the act was changed substantially?

Senator Gorton. You speak about your new process since this administration has taken over. It is to that I refer.

Mr. Arnett. The new process hasn't really addressed itself specifically to listings only. It is a whole change in administrative review.

Senator Gorton. I understand that.

Mr. Arnett. Specifically as to listings, Ron, I don't know that what we have been talking about has really changed anything in the listings, other than in 1978 where it began. We are still using that, as far as I know, isn't that right, in the listing and delisting procedures?

Mr. **Lambertson**. Yes.

Senator **Gorton**. Then break the answer to my question down. How many of each were there from that 1978 and 1979 date to, say, the beginning of this administration, and how many have there been during the course of this administration?

Mr. **Lambertson**. In 1978, the total listing and delisting was 36.

Senator **Gorton**. All listings?

Mr. **Lambertson**. I don't have that broken down by listings and delistings. Almost all of those were listings, though. In 1979 it was 70. In 1980 it was 38. In 1981 it was 4. And so far in 1982 I believe we have had 1.

Senator **Gorton**. Do you expect any significant addition to that number in the next 6 months?

Mr. **Lambertson**. Yes, we do. We have streamlined our process now. I think we have clear guidance as to what the listing process requires. And we have a number of listing packages moving through the process right now.

Senator **Gorton**. Both listing and delisting processes or just listing?

Mr. **Lambertson**. Both.

Mr. **Arnett**. Senator, one of my staff handed me this March 8 memo from the Solicitor, which is criteria for determination effects under Executive Order 12291 and the regulatory flexibility of rulemaking under section 4 of the Endangered Species Act. This has been the new thing that has made it somewhat difficult. No one has known exactly how to address this. The Solicitor now has a packet for us to deal with, the Fish and Wildlife Service, and the Solicitor's Office. We hope to be able to address that much more easily and readily and more understandably than we have in the last several months.

Senator **Gorton**. This was just produced?

Mr. **Arnett**. Yes, sir. I just have it as of March 8, so just 10 days ago or so—a month ago.

Senator **Gorton**. Thank you, Mr. Chairman.

Mr. **Arnett**. I am a month behind always. You guys are too fast for me.

Senator **Gorton**. Thank you.

Senator **Chafee**. Senator Mitchell, a coauthor of these amendments, we welcome you.

Senator **Mitchell**. Thank you, Mr. Chairman. I have a statement to submit for the record and ask that it be placed with the other opening statements.

Mr. Arnett, in your statement at page 6, and I apologize for not having been here to hear you say it, you say the Service is not requesting section 6 funds in fiscal year 1983. I think it is important to continue to encourage and support endangered species programs. They have a great deal of expertise in wildlife management. What is the rationale for your not requesting any section 6 funds in 1983?

Mr. **Arnett**. Sir, at this time the rationale is perhaps the total program that the President is trying to address. We are not opposed to matching funds when they are available with the States.

We recognize that the States have the critical habitat and the species in their individual areas. We work very closely and want to work very closely with them. But at this time we did not ask for any more because we have been trying to go with the President's desire to try to get the balanced budget and tried to work toward a savings in that area as best we can.

Senator MITCHELL. The President's budget isn't balanced in 1983 or any time in the future.

Mr. ARNETT. That is right, sir. But that is our reason for not asking for any money at this time.

Senator MITCHELL. I would ask the same question about the funding for listing of species. My understanding is that in fiscal year 1981 this was funded at $4.4 million and that in 1982 and 1983 you have requested $1.9 million, which by my calculation, is a nearly 60-percent reduction. Of course, there haven't been any listings, as the previous answer indicated. How can the Service administer an adequate listing program at this reduced funding level?

Mr. ARNETT. Senator, your figures are correct. Our main thrust at this point in time, the listing is important, but we also feel it is equally as important to try to have a recovery on these animals that are already listed. That is the thing taking precedence at this time. In hard times you have to make hard decisions. That was a decision we decided that to best move toward the endangered species requirement was to try to recover some of those species already on the list, of which there are some perhaps 800 or so, foreign and domestic.

There needs to be a lot of work done in that area, rather than just listing additional species and not taking care of the species already listed.

Senator MITCHELL. Of course, the two are not mutually exclusive.

Mr. ARNETT. I beg your pardon?

Senator MITCHELL. The two are not mutually exclusive.

Mr. ARNETT. No, sir, they are not. What we are asking, there is nothing to be done on listing. The next listing that I saw—maybe Ron could answer this for me—but there were some 49 or 50 species to be listed, when we can get all of this process working, of which there were only about two fish and maybe one mammal and all the others were plants and insects and lower forms of life.

We are very cognizant of that. There is nothing this administration or I particularly want to do to stop any listing of a species. It is simply a matter of finances.

Senator MITCHELL. I understand your answer about the budget. Obviously, you are not responsible. I just would say there are some of us who disagree with the approach of the administration. As I indicated, the President's budget is nowhere near balanced any time in the foreseeable future. I think it is a mistaken set of national priorities that we can spend hundreds of billions of dollars on things that have as their purpose the destruction of life and we can't afford $1 million, $2 million in an effort to save perhaps not human life but ultimately perhaps indirectly human life. I think these proposed budget cuts, especially no money for section 6 funding for the States, reflects a completely wrong set of national priorities. I hope that this committee and the Congress will be able to adjust those priorities for the Nation. Thank you, Mr. Arnett.

Senator **Chafee**. Mr. Arnett, under section 9, dealing with taking, there is nothing involved in the taking of individual species of endangered plants. We are going to have testimony, I am sure, asking for the expansion of the act's prohibitions to include the takings under section 9 for plants. What do you think of that?

Mr. **Arnett**. We have given this much thought, Senator, and are studying the question and would like to get back to you on this because there seems to be a constitutional question raised about the applicability of this particularly on private lands. I just don't think I am in a position—maybe some of my staff is—to give you a definitive answer at this time. But we are aware of the problem and we are looking at the constitutionality of it as prohibiting to taking on private lands, a guy's backyard, or ranch, or farm. I don't know where we are going to come back on that as yet. I would be happy to get back to you on that.

Senator **Chafee**. Whatever the constitutional problems, it would seem to me they would apply to fish and wildlife as much as plants if the problem is private lands, wouldn't it?

Mr. **Arnett**. Not to my knowledge, sir. I am not an attorney. I am just listening to the problems that our Solicitor raises along these lines. As I say, it is being studied right now. On Federal lands we currently have the authority that makes this possible. We may not be given the additional authority on other lands. It may be detrimental. It may not. It may be unconstitutional. We are aware of it, as I say, but I haven't got a definitive answer to give you yet.

Senator **Chafee**. On page 8 of your testimony you discuss the current requirement that a status review be conducted prior to the proposed listing of a species.

Mr. **Arnett**. Yes, sir.

Senator **Chafee**. How long does it take to conduct a status review?

Mr. **Arnett**. Under the act, we have 90 days from the time we receive a petition to the time we publish our determination on whether to proceed with the listing or not. So we have about 90 days now.

Senator **Chafee**. Under our proposal, we would go from——

Mr. **Arnett**. Well, the 90 days would still I think give us—as far as you are talking about, as far as the determination whether to list or not, this varies depending upon the amount of information, whether we can do it in a certain length of time. We have 90 days. The act gives us that much time. Whether we have to talk about critical habitat, whether we have enough biological information, that will determine how much further we can go and what the decision will eventually be. But the act at this time does give us 90 days. I don't think that the testimony I had—I will defer to Ron. Do we have any change on that 90-day proposal?

Senator **Chafee**. I think the 90 days is currently in the regulation, isn't it?

Mr. **Arnett**. Yes, sir.

Senator **Chafee**. We are putting it into the statute.

Mr. **Arnett**. Yes, sir.

Senator **Chafee**. What do you think of that? Is that adequate?

Mr. **Arnett**. Yes. It appears to be adequate today.

Ron, do you have any inadequacy in that?

Mr. **Lambertson**. No, no problem. The only question is in some parts of your amendment, as I remember, it left the words "status review" out. We had some concern as to whether or not the status review portion was being eliminated. It is merely a technical editorial matter. We feel that the status review is an important thing that we do conduct and would like to see it stay in the act.

Senator **Chafee**. Let's go through this time schedule again.

This is very important for us because we want to know from you folks who are trying to wrestle with these matters whether the time schedule we have set forth under these amendments is something you can handle or, just as important, whether it can be shortened; because in the evidence we are going to have presented before us, I am sure that there are going to be representatives saying the problem with this Act is it is too slow and you can't get a decision. So, in the amendments, we have set up a time limit that within 90 days of receiving the petition to list or delist the Secretary must decide if substantial evidence is presented. I understand that that time is adequate.

Mr. **Lambertson**. Correct.

Senator **Chafee**. Once he finds substantial evidence, he has to decide within 12 months whether to propose the listing or delisting and publish his reasons. How about that time?

Mr. **Lambertson**. That is adequate.

Senator **Chafee**. Can it be shortened?

Mr. **Lambertson**. Marginally. It depends on if we are dealing with a very complicated, wide-ranging species, it takes a lot of information to be collected. We would be very reluctant to say we could do it in less time than that.

Senator **Chafee**. I am not trying to beat you over the head and force you into things that are unrealistic. I know this is a complicated business. At the same time, if you think you can do better, it is helpful, because obviously, as I said, one of the attacks on this is going to be the time. You don't think you can do much better than the 12 months?

Mr. **Lambertson**. Mr. Chairman, I think the real issue that we have with this paragraph is if we get a petition and it does seem to have the kind of evidence that we need to determine that we do have to do a listing, and we have about 1,500 species presently in that category, our big question is, What is it that we are supposed to do during that 12-month period? We look at the petition, we agree that there is evidence there that would require it to be listed, but as far as priorities, it is not nearly as threatened as some other species we would like to list. The question is, Would this require us to list that lower priority species within 12 months, possibly at the cost of some other species that are going extinct much sooner? So the big issue is what is it we are required to do in 12 months? Are we required on a petition someone sends up to automatically rush into the listing process and complete it in 12 months, as I say, at the cost of other species that might have a higher degree of threat?

Senator **Chafee**. Why not do them both or several? Is it time, manpower?

Mr. **Lambertson**. Yes. As I said, we have between 1,500 and 1,600 species presently to be identified to be listed. We do probably 30 to 40 in a good year.

Senator **Chafee**. You haven't had a good year lately.

Senator **Mitchell**. If the chairman would yield, isn't that a good argument for not cutting the budget by 60 percent as you propose to do?

Mr. **Lambertson**. Senator, I think we could say there is almost no amount of budget that we could get that would allow us to list all 1,600 of those species within the last few years.

Senator **Mitchell**. Well, no question about that. But you just said that the reason you can't proceed to meet that deadline, or the difficulty with the deadlines, is you have too much to do and so few personnel to do it. Is it not logical, therefore, that is an argument against cutting the budget by 60 percent as this administration has done and proposes to continue to do?

Mr. **Arnett**. Senator, they could probably find lots of arguments for not cutting the budget 60 percent. But that is the wisdom of the Congress to decide what our budget will be. That is our recommendation, the cuts we have made to you, sir.

Senator **Mitchell**. I understand that, Mr. Arnett. I understand the position you are in. All I am saying is his answer certainly contradicts the suggested reduction of the budget by 60 percent for the listing. It is obviously an arbitrary figure unrelated to the demands on the office.

Mr. **Arnett**. It contradicts only to the point if we are going to get all 1,500 done, we could probably have a 600-percent increase in the budget to get it done in an expeditious time. There is just not that much money available. The decisions have to be made, sir, of what the priorities are. We realize that they have to be listed. Some are more critical than others. That is what Mr. Lambertson was addressing it to. Those most critical we have to address first. We are not going to get all 1,500 of them no matter how much money the Congress is willing to give us this session. We are not going to get it done this year, or probably the next 5 years.

Senator **Mitchell**. I understand that. Surely you will concede there is too much to do and not enough personnel to do it. I am saying that is obviously an argument not to cut it 60 percent. And nobody is suggesting you raise it 600 percent.

Excuse me, Mr. Chairman.

Senator **Chafee**. Under the 12-month period, what the Secretary has to do is make a decision. That doesn't mean that if there is substantial evidence, for example, to list, that he has to list, but he has to make a decision. He might well decide it should be listed, but he doesn't have the manpower to furnish the background for his decision. That is something he would say. He would say, "I am unable to list because I don't have the manpower; I can't do it." That at least gives people the decision.

Mr. **Lambertson**. We would have no problem with that interpretation. It presently could be construed, though, that the Secretary must determine whether or not to propose. That could be construed. So I am afraid that if we don't actually propose within 12 months, we could be in court being ordered to propose a species which is a much lower priority species than the ones we are working on. That is our concern. We would like that to be clarified.

Mr. ARNETT. Those are some of the things we are getting at in this hearing. Some of the things we are not clear on, we would like the Congress to clarify for us. What is your intent? We are not sure what that means. We interpret that one way, as Mr. Lambertson pointed out. If it is your intent he doesn't have to make a listing in that 12-month time, fine. We just want to know what the congressional intent is along those lines. We would be happy to work with your staff in trying to determine those.

Senator CHAFEE. Except you have had a chance to study this. You are not coming at this cold.

Mr. ARNETT. No, sir. But we just don't——

Senator CHAFEE. Mr. Lambertson and some others have worked on this. Did you raise this point in your testimony?

Mr. LAMBERTSON. Yes, sir.

Mr. ARNETT. Yes, sir.

Senator CHAFEE. We will address that.

What about the provision that within 2 years from the date of the proposal there has to be a final determination with respect to the action and the publication of the reasons for the decision? What about that time limit?

Mr. LAMBERTSON. That is presently in the act and we are presently complying with that. We see no problem with that.

Senator CHAFEE. Can it be shortened?

Mr. LAMBERTSON. I would suggest we not shorten it. We have a number of listings that are going to be running against that 2-year period this year. I am afraid if we shorten that time period we could have some real problems.

Senator CHAFEE. Getting back to Senator Gorton's question, are we going to see some action down there and some listings soon?

Mr. LAMBERTSON. As I said, Mr. Chairman, we have a number of listing packages that are in the pipeline. We have clear instructions from the Solicitor's Office as to how to do our economic analysis under the Executive order and the Regulatory Flexibility Act. We think we now are capable of producing those packages and meeting those requirements.

Senator CHAFEE. And we can expect some action?

Mr. LAMBERTSON. I think so.

Senator CHAFEE. Any other questions, Senator Gorton?

Senator GORTON. Yes. I have one other question.

Mr. Arnett, would you turn to the bottom of page 10 of your testimony? Your testimony there expressed in that paragraph on the bottom of page 10 and the top of page 11 on the time in which this decision as to an irreversible commitment of resources has been made, you criticize or at least question postponing it. That position is clear. But that is fairly important. Can you elaborate in any respect on how it is that you came to that decision and how important that change or, rather, reversing that proposed change is to you?

Mr. ARNETT. May I defer that to Ron again.

Mr. LAMBERTSON. Senator, our concern here is that the commitment of resources issue is a very fundamental issue. It is an issue that can and we feel should be addressed very early on. We do not feel that a permit applicant or a federal agency should go through the whole process and get clear to the end of the process, committing almost 200 days of resources and time into this process, without having some indication on whether or not he violated a very clear rule of no commitment of resources.

Senator GORTON. You are not proposing to retain the board which is eliminated by this bill——

Mr. LAMBERTSON. No.

Senator GORTON [continuing]. But simply to have the Secretary make that determination as a threshold determination.

Mr. LAMBERTSON. We are interested in getting that threshold determination moved up so someone who has violated this rule wouldn't go through the total process before the decision is made.

Senator GORTON. Thank you.

Senator CHAFEE. Senator Mitchell?

Senator MITCHELL. No further questions, Mr. Chairman.

Senator CHAFEE. Mr. Secretary, on that, I know you have a further appointment, so if you wish to be excused, that would be satisfactory. We have no further questions. We will obviously be talking with Mr. Lambertson as we bring this to a conclusion because we want to move on with it. I would hope you would make Mr. Lambertson available to us, Mr. Arnett.

Mr. ARNETT. Thank you very much. Any time, sir. It has been a pleasure working with you. I am sure Ron is very familiar with your staff people.

Senator CHAFEE. Thank you, Mr. Lambertson.

Mr. Stevenson, do you have a statement?

Mr. STEVENSON. Yes, I do.

Senator CHAFEE. If you want to summarize it, we will put it in the record. You may proceed. It is a little long. I would summarize it, if I were you.

STATEMENT OF WILLIAM H. STEVENSON

Mr. STEVENSON. Thank you, Mr. Chairman. I will be glad to summarize the statement. I will make it as brief as possible.

I appreciate the opportunity to provide the subcommittee with comments on S. 2309. In the testimony presented before this subcommittee in December of 1981 and before the House Subcommittee on Fisheries and Wildlife Conservation and the Environment in March 1982, I stated that the Endangered Species Act has worked well for marine species and that the few issues that the National Oceanic and Atmospheric Administration identified could be resolved administratively.

Based on our experience with the act and in compliance with section 607 of the Congressional Budget and Impoundment Control Act of 1974, the Department of Commerce sponsored a bill, S. 2310, to reauthorize the Endangered Species Act for 2 years without amendments. We have reviewed the issues that have been identified during the reauthorization process. We hold to our original opinion and continue to believe the passage of S. 2310 will meet our needs.

Nevertheless, I believe that it is appropriate to provide this subcommittee with comments on S. 2309 in the event the committee believes the amendments are necessary. Furthermore, the proposed amendments would affect the National Oceanic and Atmospheric Administration's programs and in certain cases may create confusion concerning the Department of Commerce's regulatory authorities under the act. I recognize the importance of maintaining a statutory authority that protects fully the important species of animal and plant life which are or may become threatened or endangered. S. 2309 with some clarification does this.

My comments and my summary will deal only with those issues on which we have a specific position of opposition to the act, Mr. Chairman. In the other cases we have made specific recommendations for clarification or have identified areas where we feel it is the subcommittee's responsibility to make some clarification or change. We stand prepared, of course, to help the subcommittee in any way we can to assist in this.

The two areas that I would specifically call to your attention, Mr. Chairman, are on page 2 of the testimony, the listing process, in which the National Oceanic and Atmospheric Administration opposes the suggested amendments to section 4(a)(2). The amendment authorizes the Secretary of Commerce to determine whether threatened species should be subject either to more restrictive or to less restrictive regulation and requires the Secretary of the Interior to "implement such action." The language provided would allow the Secretary of the Interior to rewrite protective regulations promulgated by the Secretary of Commerce.

Section 4(d) of the existing act provides the Secretaries of the Interior and Commerce with the necessary authorities to promulgate regulations concerning listed species under their respective jurisdictions. The proposed language would not enhance such authorities and indeed may undermine the efforts of the Department of Commerce to promulgate regulations for the protection of threatened species under its jurisdiction.

Senator CHAFEE. I think we ought to be able to fix that up. OK, go to the next one.

Mr. STEVENSON. The next specific item I call your attention to is on page 6 under the consultation process.

Senator CHAFEE. I was talking about the critical habitat. Are you going to take that up now?

Mr. STEVENSON. I will submit it for the record. I will be glad to go through it.

Senator CHAFEE. No. Let me just take a quick look at that.

Mr. STEVENSON. That is on page 3.

Our concern there, Mr. Chairman, is if it is required that you must designate critical habitat in the listing process, we would have a problem in that it may in fact delay the listing process itself until enough specific information was acquired to identify the critical habitat.

Senator CHAFEE. Isn't that under the current law already?

Mr. STEVENSON. Yes, it is, Mr. Chairman. The same procedure is identified. However, under the present law, you can also list critical habitat at times in the future. We would suggest that the subcommittee clarify that you would still be able to list critical habitat in the future if you did not identify it at the time of listing.

Senator CHAFEE. All right. We will take a look at that. What is the next one?

Mr. STEVENSON. The same situation is true in that paragraph. We identified the regulation issue on the same basis.

Turning to page 6 of the testimony and the consultation process, the National Oceanic and Atmospheric Administration objects to the proposed amendment to section 7(b) that would include any license or permit applicant in determining an agreeable period of time in which to conduct consultation pursuant to section 7(a)(2). The consultation requirements pertain only to Federal agencies who would determine the period of time required to meet those requirements. Federal agencies should be aware of the concerns of applicants during the consultation process and should extend that process beyond the 90 days provided in the existing legislation only when adequate consultations cannot be completed in that time.

Senator CHAFEE. Under the amendment we have, we say the applicant's permission must be received for an extension of the time. You are saying that you don't want that in there.

Mr. STEVENSON. That is correct, Mr. Chairman.

Senator CHAFEE. Give me the rationale again.

Mr. STEVENSON. We feel that the Federal agencies that are responsible are in a position to work with the applicant and to take the responsible position of not extending beyond the 90 days unless it is absolutely necessary.

Senator CHAFEE. You mean experience has shown that?

Mr. STEVENSON. Yes.

Senator CHAFEE. We are going to have people objecting to this act. They say that they can't get a decision, that the Government agencies prolong the decisions and receive extensions and the applicant is left out in the cold. So our objective here was to include the applicant. But you don't want that.

Mr. STEVENSON. We feel that that can be done administratively in working with the applicant. Our experience in the National Oceanic and Atmospheric Administration, I am not aware of our having that problem in the administration of those species listed under our jurisdiction, Mr. Chairman.

Senator CHAFEE. How much of a burden do you folks have under this? How much does this actually involve Commerce?

Mr. STEVENSON. We have about 15 species which are listed or involved in the Endangered Species Act at the present time, Mr. Chairman, most of which are whales and six species of turtles and one species of fish.

Senator CHAFEE. So the intricacy of the problems you are challenged with is somewhat less than, say, the Secretary of the Interior. His problems are different.

Mr. STEVENSON. Yes. I would agree with that statement, yes.

Senator CHAFEE. Particularly when he has so many more species than you have to wrestle with.

Mr. STEVENSON. I am not in a position to evaluate the complexity of the Department of Interior, but from my personal observations, it would appear they have a much more difficult problem.

Senator CHAFEE. Go ahead.

Mr. STEVENSON. The last item I would call your attention to, Mr. Chairman, is the issue of authorizations on page 7. The National

Oceanic and Atmospheric Administration supports the authorization of appropriations that were specified in S. 2310, the bill submitted by the Department of Commerce. These were not to exceed $2,179,000 for fiscal year 1983 and such sums as may be necessary for fiscal year 1984.

As indicated in my opening remarks, Mr. Chairman, I have not specifically identified many aspects of the act that we do support and do consider as being improvements in the administration of the bill without jeopardizing the integrity of the bill, as you indicated before.

This concludes my informal statement, Mr. Chairman. I would be glad to answer any additional questions you may have.

Senator CHAFEE. Senator Gorton?

Senator GORTON. On page 6 of your testimony you say that Federal agencies should be aware of the concerns of applicants. Why shouldn't, under those circumstances, the applicant have an active part in the decisionmaking process? Doesn't the applicant generally know best what his own concerns are?

Mr. STEVENSON. Yes. And I think what we are really trying to say here, Senator, is that if the Federal agency is responsible, it is working with the applicant on a continuous basis, on any particular application.

This is the normal procedure under which we operate when we are going through a procedure of this type. So the applicant would be aware if there was going to be a delay beyond the 90-day period. That would be a normal procedure for us in our method of operation.

Senator GORTON. Thank you. Thank you, Mr. Chairman.

Senator MITCHELL. Let me follow up on that. You also said that your agency hasn't experienced any problem in that regard. Then why should you object to this amendment which would address a problem that apparently is being experienced by the other agency involved?

If you look at your statement, Mr. Stevenson, you read that last sentence beginning with the words "Federal agency," it makes it sound like you don't want delays beyond the 90 days provided.

Mr. STEVENSON. That is correct, we do not.

Senator MITCHELL. That is the purpose of this amendment.

Mr. STEVENSON. We don't feel that it is necessary to make it a statutory situation in order to get effective 90-day performance.

Senator MITCHELL. That is in the case of your agency which handles a small portion of the subject matter of this act.

Mr. STEVENSON. Yes, sir.

Senator MITCHELL. You are unaware as to whether or not this is a problem with respect to the agency which handles the majority of the subject matter of this act.

Mr. STEVENSON. Yes. I cannot address what impact this would have on them.

Senator MITCHELL. So if it is no problem for you, if you are meeting the 90 days, and apparently your concern is one of proper administration, you want to be able to make that decision yourself without the required consent of the applicant. Then surely you understand if there is a problem dealing with the subject matter of the act by the other agency that has a majority of it, that that is a small concern of yours, that is outweighed in the process if it is true, as I have suggested, they have a big problem.

Mr. **Stevenson**. Yes.

Senator **Mitchell**. Fine.

Senator **Chafee**. Any other questions? All right, fine. Thank you very much, Mr. Stevenson. We appreciate it. If you are available, perhaps if you could just remain here, we may pick up some other questions we will want to deal with you on as Mr. Colson gives his testimony. So, Mr. Colson, why don't you proceed.

STATEMENT OF DAVID A. COLSON

Mr. **Colson**. Thank you, Mr. Chairman, members of the committee. I appreciate the opportunity to present the Department of State's views on the reauthorization of the Endangered Species Act.

I would like to note that I am accompanied today by Scott Hajost and Mr. George Finess. I do have a prepared statement. I would ask that the full text of the prepared statement be inserted in the record.

Senator **Chafee**. That will be done.

Mr. **Colson**. The Department is before you today to firmly support reauthorization of the act without amendments which would erode our international leadership position in wildlife conservation or question our international obligations. We believe that S. 2309 accomplishes this goal.

Senator **Chafee**. Accomplishes what goal?

Mr. **Colson**. It acomplishes the goal of passing a reauthorization statute which does not erode our position or call into question our international obligations.

Senator **Chafee**. All right, fine. You can conclude your testimony right there.

Mr. **Colson**. I have my bureaucratic obligation to fulfill.

The U.S. leadership in the international community in wildlife conservation is well known. The United States inspired and led the negotiation of the Convention on International Trade in Endangered Species which we know as CITES. We have effectively implemented CITES through our Endangered Species Act. We need to maintain our leadership role if we want to be an effective advocate both within and without of CITES for wildlife conservation.

Of possibly more practical importance in the international arena we are living in today is we need to maintain our leadership position so that the United States can structure and lead in the effort to strike the balance between conservationists and commercial or industrial interests. Without strong leadership from the United States, the balance one way or the other may well be skewed.

Turning to some specific comments on S. 2309, most of the proposals in your amendment relate to matters that are within the province exclusively of the Department of the Interior and the Department of Commerce. But there are a few points which are of concern to the Department of State.

Of particular significance is section 8 of S. 2309 which would amend section 8A(c) of the act, including the functions of the scientific community in CITES. We believe that the proposal, S. 2309, is consistent with our international obligations under CITES. It would retain the independent authority of the Secretary of Interior acting as the U.S. national scientific authority to make "no detriment" determinations as required by CITES.

However, the proposed amendment would make clear that the Secretary of the Interior is not required to use or not use any specific method in arriving at such determinations.

Mr. Chairman, there are some other technical matters relating to some concerns we have about section 8 and section 4 of S. 2309 which are mentioned in the prepared statement which I would commend to the committee's attention.

Since the Department of State did not testify before you during earlier oversight hearings, there is another point of a general character which we would like to raise. We are aware that some interests at this time that the act is being reconsidered are advocating that a required reservation procedure be legislated into the act. We do not believe that this would be a wise approach and we are happy to note that S. 2309 does not contain such a provision. In a quick review, we have not found any other international convention that has a legislated reservation procedure.

There are good reasons for this. Amongst those is that the concept in general raises interesting constitutional law issues concerning the role of the President and his treatymaking power. But setting those constitutional law issues aside, there are good policy reasons against automatic reservation proposals.

As a matter of discretion, the President would normally revert to a treaty if an amendment violated the U.S. law, was impossible to implement, or if it substantially harmed the U.S. interest without commensurate benefit. But this is all done as a matter of discretion. We believe that it should remain so.

The decision to stay a reservation should be made after an assessment of the full range of interests at stake in any particular matter.

We are also concerned and we feel we should be very cautious about submitting CITES to broad-scale taking of reservations. Constant reservations to CITES in spite of some 70-some member states of that convention could turn what has been a very effective international institution into one that could be very ineffective.

Having said that, Mr. Chairman, I wish to underscore the Department of State has no objection in principle to treaty reservations or in particular reservations to CITES. What we are concerned about is a mandatory or statutory required reservation in any particular instance.

In closing, I would like to note the considerable international interest in our Endangered Species Act and in this reauthorization process. The act is a precedent that many other nations have followed. On behalf of the Department of State, I would urge that the act be reauthorized as it has in the past. The Department believes that S. 2309 is a proper mode for doing that.

Thank you, and I would be happy to answer any questions you may have.

Senator CHAFEE. Mr. Colson, first I want to extend to you our thanks for stressing before us the international implications of what we are doing here. I have had others from other countries say to me that this act is the linchpin that holds together CITES and the efforts by other nations to protect their endangered species. If we deviate or weaken this act substantially, it will cause considerable strain on the efforts of other nations to uphold and enforce their endangered species acts. So what you have testified to here reinforces the importance of our getting on with this act and preserving it essentially as it is.

We subscribe to these international conservation efforts, the members of this subcommittee. I think I am safe in speaking for the others on that. Therefore, I am glad that you approve of what we have done and what we haven't done, your last point in connection with the reservations. So that is very, very important testimony because I suspect that others will come before us and seek these reservations. So we are glad to have your testimony and it will form a very important part of this record.

Senator Gorton?

Senator **GORTON**. No questions.

Senator **CHAFEE**. Senator Mitchell?

Senator **MITCHELL**. I would just ask you to, if you can, expand briefly on the constitutional aspect of the mandated reservation. Are there any precedents, pro or con, on that, to your knowledge?

Mr. **COLSON**. There are no precedents that we have become aware of in a very quick review of a legislated, required reservation to an international agreement, that in a particular instance the executive would be required to take a reservation if a certain fact situation developed. We are unaware of that as a precedent over our history as a Nation. This has always been a matter of discretion for the President. With the constitutional traditions we have and the reference to the President's treatymaking power, we have not done a thorough legal analysis of how this would play out if we were at the Supreme Court arguing about the constitutional nature of this. We simply note it as a potential problem.

Senator **MITCHELL**. But would it not be fair to say that the absence of any precedent for such action is itself a precedent?

Mr. **COLSON**. Certainly, sir.

Senator **MITCHELL**. And an indication that is a strong argument at least as to custom and tradition regarding the execution of foreign policy in this country?

Mr. **COLSON**. Very much, sir.

Senator **MITCHELL**. Thank you. I have no further questions.

Senator **CHAFEE**. Does anybody have further questions of Mr. Stevenson?

All right, gentlemen. Thank you very much. We appreciate your coming this morning.

Mr. **STEVENSON**. Thank you.

Mr. **COLSON**. Thank you, Mr. Chairman.

Senator **CHAFEE**. The next panel will consist of Mr. Huey, Mr. Williamson, Secretary, Wildlife Management Institute, and Mr. Blair of the Nature Conservancy.

It is now 10 past 11. As always happens in congressional hearings, the first panel gets more time than the other panels. But we will balance this up. We have eight witnesses and we have, say, an hour and a half, and that is 90 minutes. So if each witness can summarize his testimony, and this panel will go until 20 past. You have 20 minutes for this panel.

Mr. Huey, we welcome you as a person honored by the National Wildlife Federation a couple of weeks ago. We salute you. We are interested in hearing what you have to say. Do you have a statement?

Mr. **Huey**. Yes, Mr. Chairman.

Senator **Chafee**. All right. All of these statements, so I won't repeat it, will go into the record, and if they can be summarized, it will help us. Go to it, Mr. Huey.

STATEMENTS OF WILLIAM S. HUEY, SECRETARY, NEW MEXICO NATURAL RESOURCES DEPARTMENT, REPRESENTING INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES; LONNIE WILLIAMSON, SECRETARY, WILDLIFE MANAGEMENT INSTITUTE; AND WILLIAM D. BLAIR, JR., PRESIDENT, THE NATURE CONSERVANCY

Mr. **Huey**. Thank you, Mr. Chairman, Senator Mitchell and Senator Gorton.

First I would like to say that this entire exercise of consideration of the Endangered Species Act reauthorization has been one of the most productive exercises I have been involved in with the Congress. The committee and the committee staff have been very receptive to our suggestions, although they haven't done everything we would like them to do. We have had good dialog. We have talked frequently on the telephone. We have met personally to discuss these matters. I would like to thank the committee and the staff for that consideration.

Senator **Chafee**. We thank you for coming up for our oversight hearings we held last December, Mr. Huey.

Mr. **Huey**. Thank you, Mr. Chairman.

In that respect, and I don't cover this in my testimony and it has been discussed today, the period of reauthorization, I would like to suggest that it is quite expensive and time consuming to come every year to discuss these things. I would sincerely hope that the committee would continue their intention of pursuing a reauthorization for a period of 3 years rather than making this an annual exercise.

Senator **Chafee**. We second that thought. We find it is expensive and time consuming for us, too, and for the committee to go through this. So those are powerful arguments for a 3-year authorization.

Mr. **Huey**. Thank you, Mr. Chairman.

My written testimony covers the concerns that we have. Generally we are in support of S. 2309. I had some notes here of a summary nature. I am going to skip some of those in the interest of saving time of the committee. Hopefully when we are completed, if you have any questions that I might be able to answer, I would be happy to respond to those.

We particularly thank the committee and the staff for recognizing our concerns with experimental populations. We thank you for the change in the funding formula. The 75 percent of zero is certainly better than 66⅔ of zero.

In section 4, the listing process, we are concerned that there are a number of evidentiary formulas provided there. We are not sure just exactly which ones are to be observed.

We are also concerned with the addition of the word "determinable" to the Secretary's prerogatives with respect to the identification of critical habitat. I feel very strongly, Mr. Chairman, and the International Association feels strongly, that the critical habitat should not be separated from the listing process. It might slow the process down a little bit, but it adds integrity to the listing process. But I think integrity is one of the things we have to recognize in protecting the workability of the act. When you are out in the West where I am with State legislatures and with a strong public constituency that quite frequently has a difficult time understanding our concern for endangered species, this credibility is an important matter. I would much rather see us continue to maintain that integrity of the process than to rush into a listing of a number of new species.

I also feel that by maintaining this integrity we are much more in a position to work toward the removal of species already listed than we would be if there was a complete lack of confidence in what we are doing.

We are concerned with the addition of another element in the listing process, the scientific professional organizations. We would like to see a definition of that term. I am sure a lot of things we refer to in our written testimony and that I am discussing here this morning can be handled perhaps in report language. We would request consideration be given to that.

With respect to the bobcat again, we are very much obligated to the committee and the staff for recognizing this as a serious problem. I appreciated the testimony of Assistant Secretary Arnett this morning with respect to the reference to reliable wildlife management practices. I am also concerned we are not just throwing ourselves back into another court action with those persons who would contest every action that was taken saying that those practices are not reliable wildlife management practices. I think his term "professionally accepted"—I think that was the term he used—would take care of that question. I think it would be considerably more difficult to develop an irresponsible court action. I think it would be possible to protect the Secretary from an irresponsible action.

I would also like to comment briefly, although our written testimony doesn't include this, on the testimony of the State Department with respect to reservations. This is another area that I have concern for because I have seen other major powers at meetings of the parties either announce or, immediately following the meeting of the parties, take reservations for commercial reasons. I would suggest that none of us has advocated the United States take reservations for that purpose, but again to maintain the credibility of the entire process, and the only thing we have asked is that we take a position that if the parties take action that is inconsistent with the terms of the treaty or with the guidelines developed by the parties with respect to administration of the treaty, that more attention be given to taking reservations so that perhaps the leadership position of the United States will be recognized in debating these positions. I have seen the United States take a strong position advocating biological responsibility and I have seen the parties to the treaty overrule the position of the United States, in some cases for political reasons, perhaps 17 some cases for commercial reasons, or whatever reasons they take those measures, they are inconsistent with the guidelines of the treaty. I think the treaty is going to suffer and the treaty is suffering now for that reason.

I certainly don't think that the position of the United States should ever be so well defined we are not in a position to negotiate. But I do think that we have never taken a reservation and certainly there have been some situations where reservations were indicated because of the inappropriateness of the action of the parties with respect to abiding by their own regulations and by their own treaty language.

The only other thing I have to say, Mr. Chairman, is with respect to section 9, having to do with the Attorney General, giving the Attorney General authority to act on allegations. We would assume those are not allegations developed by the public but allegations developed by investigations of an appropriate agency or by the Attorney General and that he would only pursue action on those types of allegations.

Again, thank you, Mr. Chairman, for not only the opportunity to appear before you but the opportunity to work with your committee and the staff on what I consider to be a very important part of the legislation.

Senator **Chafee**. Did we get that experimental population worked out to your satisfaction?

Mr. **Huey**. Yes. I would like to see——

Senator **Chafee**. Well, that is fine. We won't press you any more.

Mr. **Huey**. I am a little concerned, Mr. Chairman, in discussing the thing, we had discussed a provision that would provide a working agreement, a memorandum of understanding between the State and the Secretary. That language was left out. If we are going to leave that out, I would like for the amendment to remain silent on jurisdiction. I think that we should have a cooperative agreement between the State and the Secretary.

We never see any of these things work that the State is not involved in. We very seldom see any of them attempted without the involvement of the State. I don't see why anyone would hesitate to have the State involved in a cooperative agreement with the Secretary. Either one way or the other, Mr. Chairman, I would like to see that situation addressed; either to provide some jurisdiction to the State or leave the question of jurisdiction silent.

Senator **Chafee**. That is what we did.

Mr. **Huey**. Well, not completely, Mr. Chairman. I think there are two sections there where the Secretary is given authority to issue permits when persons do this. There are other portions of the act that provide him the authority to issue permits for people to handle and be involved in endangered species. That covers this question, without going ahead and mentioning again his specific authorization to permit the establishment of experimental populations. We have experimental populations established already, but not by that definition. They have just been established under other sections of the act.

Senator **CHAFEE**. It is a case where I shouldn't have asked you any questions, I guess.

Why don't we take the other two panelists and then we will get back to you.

Mr. Williamson?

STATEMENT OF LONNIE L. WILLIAMSON

Mr. **WILLIAMSON**. Thank you, Mr. Chairman. I am Lonnie Williamson, secretary of the Wildlife Management Institute. I would like to congratulate the subcommittee for developing what we believe is a bill that deals with most of the substantive issues that were discussed at oversight hearings.

Those issues were addressed by the subcommittee in a manner that does not weaken the act's force in protecting and enhancing endangered and threatened populations of animals and plants.

In supporting this act, Mr. Chairman, we would like to offer two suggestions for the committee to consider for changes.

First, we would recommend that the word "reliable" be eliminated from section 8(2) and replaced with the word "accepted," so that the sentence reads:

> Such determination and advice shall be based upon the best available biological information derived from accepted wildlife management practices.

We make this recommendation not because the word "reliable" would create management difficulties but because we are advised that it may invite additional and unwarranted legal actions which the language is designed to overcome.

The discussions on what word to use in place of "reliable" were exhaustive. We subsequently went for ideas to the rules and regulations for implementing the PR and DJ Acts. One of the criteria used by the Interior Secretary to determine if a project proposed by a State is "substantial" as required by law is whether the project is designed in accordance with accepted fish and wildlife conservation and management practices. The same word—accepted—is used in the draft regulations that the U.S. Fish and Wildlife Service has developed to implement the Chafee-Forsythe Act of 1980, the so-called Nongame Act.

Although the word to our knowledge has not been tested in court, we feel that it has been an adequate guide for the Secretary in judging P–R and D–J projects and could work equally as well in determining the adequacy of information supporting no-detriment findings. There is value, we believe, in this same word being used in all three of these important acts and programs.

Knowing and having confidence in the professional wildlife people of the State agencies and the U.S. Fish and Wildlife Service, we do not visualize a management problem created by replacing "reliable" with "accepted." There is no reason to assume that the agencies will use any practices to collect information that are not accepted, adequate, reliable, and so forth. Otherwise, the tremendous gains of wildlife populations in this country during the past 75 years would not have occurred. Therefore, if the word change would in fact satisfy any legal concerns that may exist, we hope the subcommittee would make that modification. Should any concern ever be voiced, I am certain that this country's two professional societies, the Wildlife Society and the American Fisheries Society, can pass judgment on the acceptability of any fish or wildlife conservation and management practice that is used.

Second, Mr. Chairman, we continue to believe that the Endangered Species Act should be amended or that language should be added to the report on S. 2309 requiring the United States to take a reservation on species listed under CITES but not listed under the Endangered Species Act. Control of this Nation's wildlife should remain in the hands of the U.S. agencies, both Federal and State. We should not permit multinational authority over our wild plants and animals to occur. You may recall that apprehension about the loss of sovereignty over our wildlife led to the decision that the United States not agree to the proposed Convention on the Conservation of Migratory Species of Wild Animals in 1979.

We do not concur in the argument that the United States should sometimes go along with CITES listings that are troublesome for management programs merely for diplomatic reasons. Neither should we acquiesce to such listings in order to maintain world leadership in wildlife conservation, as some have suggested. We are not the least bit interested in appeasing some other country by crippling hard-won wildlife management programs at home. Surely our statesmen do not need such concessions to operate effectively. Furthermore, the idea that the U.S. should accept any listing in order to continue as a world leader in wildlife conservation is ridiculous. One occupies a position of leadership by leading, not by following.

Thank you, Mr. Chairman.

Senator **Chafee**. All right, fine. We will question you when Mr. Blair finishes.

Mr. Blair, we welcome you here. Why don't you proceed. If you can summarize your statement, we will put it in the record.

STATEMENT OF WILLIAM D. BLAIR, JR.

Mr. **Blair**. Thank you, sir. I will touch very quickly on two or three points from it.

I would like to thank most warmly you, Senator, and Senator Mitchell and Senator Gorton for your very constructive and effective effort in Senate bill 2309 to improve the functioning of the Endangered Species Act where that has been clearly shown by experience to be most needed.

The Nature Conservancy enthusiastically supports your approach in this effort and the bill in general and in particular such proposed changes as the establishment of a category of experimental populations to encourage efforts to reintroduce endangered species into presently unoccupied areas of their historic ranges; shortening the exemption process; providing for exemptions from the section 9 taking prohibitions for takings incidental to development which has been adjudged to be allowable through the consultation process, and also renewing the act for 3 years at an authorized funding level of $36.9 million. We welcome the substantially more workable listing process proposed by your bill and the requirement that a final determination to list or not to list be made within 2 years of publishing the proposal, with clear reasons for the decision given. These measures, it seems to us, address the essential failure of the scientific ascertainment function of the act as it stands. We regard that function if all else fails as the critical contribution of the act, the thing that needs to be cherished and perfected at whatever cost.

We also welcome, Mr. Chairman, the easing of requirements for designation of critical habitat at the time of listing to the extent that such habitat may not at that time be determinable. This accords with the reality of our knowledge or lack of knowledge in many cases and removes an unwarranted impediment to listing.

However, we are concerned that economic considerations have not been removed from the critical habitat designation process. Like the listing process, it seems to us that this should be an entirely scientific and biological evaluation only.

The act makes ample provision in section 7 for examination of possible economic costs and tradeoffs, and it is in the consultation and exemption phase and not surely in the scientific ascertainment phase that those costs and possible tradeoffs should be examined. We therefore regret that S. 2309 as presently drafted retains the authority for the Secretary to exclude areas from designation as critical habitat on economic grounds. As I say, that should be a biological judgment. In our view this should be corrected.

I am going to skip down to the last important point—in the interest of time—that we would like to make, Mr. Chairman. That is to say that I think we all have to recognize that the endangered species program is seriously underfunded and that the good efforts which have gone into your bill and are going into this process of correction won't be of much significance if the funding to give effect to the whole program is inadequate.

In particular, we feel that the proposal to offer zero grant assistance to States for this work again next year is a false economy. It seems to be based on the false assumption that States should need no help in doing their own job in their own best interests. The fact is that the States are doing a great deal now and could be doing more to help carry out a national policy on endangered species in the national interest. Using Federal matching funds to provide an incentive for State efforts on identification, protection, recovery, and enforcement is the most economical use of those Federal funds, in our judgment.

Accordingly, I would urge this committee to work with the Appropriations Committee to provide at least $3 million for grants to States under section 6 of the act and to obtain increased and not reduced funding or equivalent funding for the endangered species program overall in fiscal 1983. Thank you, Mr. Chairman.

Senator CHAFEE. Fine. Thank you, Mr. Blair.

I would like to ask Mr. Huey what he thinks of the proposal of Mr. Williamson dealing with the word "accepted" in connection with the biological information.

Mr. HUEY. I think what Mr. Williamson and Assistant Secretary Arnett suggested are close; you know, identifiably close. I wouldn't have any quarrel with either of the suggestions because I think both of them would accomplish what we are trying to do. That is to establish a definition that has some background, has some prior use, and that would be less likely to be the subject of a court contest. That is what we are trying to avoid.

Senator CHAFEE. I think that is a good point.

The points that Mr. Blair raised about the economic factors are important ones. We will take that into consideration also.

Senator Gorton?

Senator GORTON. Mr. Huey, both you and Mr. Williamson, I take it, continue in the criticism you had of earlier testimony on the part of the State Department in which you describe it as, and I quote, "an extraordinary lame position." Would either of you amplify on exactly what it is that you wish in this regard? Do you limit it to species which are native to the United States, and can you give us examples of where such an automatic reservation would have taken place in the past if it had been a part of the law, and what positive effects that reservation would have had?

Mr. HUEY. Mr. Chairman, Senator Gorton, I wouldn't limit it to species that are only found in the United States. I think that what we are talking about, and the other persons who discussed this matter have recognized our international position of responsibility. I think we should occupy a position of responsibility. If we address only those species that are native to the United States, we are suggesting that we haven't any interest in the species of other continents or other countries.

Senator GORTON. Excuse me. I think that your testimony on page 8 says, "We suggest to you that where a proposal is made by a third-party signatory to list a species native to the United States."

Mr. HUEY. But you asked a question.

Senator GORTON. You wouldn't want to be more broad than that?

Mr. HUEY. My written testimony is limited to that position. I was just suggesting if we are going to recognize—I am expressing an opinion now, not the opinion of the international association. I have attended three meetings of the parties of the Convention on Trade in Endangered Species. I have seen these things happen, where we list not only entire families but entire orders without the data that is required by the criteria established at the meeting in Berne. I don't think that is the responsible thing to do because of the degree to which it taxes the credibility of the treaty. I think we lose acceptance and support for the whole treaty process, the whole involvement in international treaties having to do with wildlife.

As Mr. Williamson pointed out, there was significant resistance in this country to consideration of the Migratory Wildlife Treaty, the Berne Treaty.

I think that is the reason. It is because we have become concerned with the credibility of this treaty process, where the United States, who has always occupied a considerably more responsible position in the welfare of wildlife than most other countries, has its judgment overruled, and as I said before, sometimes for political reasons, sometimes for economic reasons, or whatever the reasons might be. We find ourselves in a position of one vote in a large arena.

Senator GORTON. Mr. Williamson?

Mr. WILLIAMSON. To answer the second part of your question, Senator Gorton, I think an example would be the bobcat. Had we taken an exception with the bobcat, we would have saved the State agencies, U.S. Fish and Wildlife Service, and the Congress quite a bit of time and several millions of dollars that could have been better spent on something other than court actions and digging up data trying to comply with court proceedings.

Senator **Gorton**. Would you limit the reservation process to species native to the United States?

Mr. **Williamson**. Yes. That I spoke to is the species that are U.S. species, not foreign.

Senator **Gorton**. Thank you, Mr. Chairman.

Senator **Chafee**. Senator Mitchell?

Senator **Mitchell**. Thank you, Mr. Chairman.

Mr. Huey, you said in your remarks that the critical habitat determination should remain as a part of the listing process to give it credibility. Mr. Blair argues that because the critical habitat determination involves economic considerations, it ought to be removed from the process or separated from the process because he does not think that the listing process should involve economic factors. How do you respond to that, Mr. Huey?

Mr. **Huey**. I am concerned with any economic consideration that would cause a species that should be listed not to be listed. I think that the listing process should be a biological process. With the development of the exemption process, I think that the economic consideration that formerly involved the listing process is diminished in its importance because the exemption process provides an opportunity to look at those things, if in the judgment of those persons given that authority economic considerations could override.

I am not dedicated to maintaining a situation which permits species, as I said before, to not be listed because of economic considerations, but I do feel that the critical habitat is an important consideration and should not be separated from the listing process.

Senator **Mitchell**. So you and Mr. Blair are in agreement on the general principles, but you disagree on whether or not the current law needs changing to accomplish that objective.

Mr. **Huey**. I think that is perhaps correct, Mr. Chairman, Senator Mitchell. I don't have any suggested language, but you have such competent staff, I am sure they could work something out.

Senator **Mitchell**. All of this praise, Mr. Huey, is in lieu of a raise for them. It is called psychic remuneration.

Mr. **Huey**. No comment, Mr. Chairman.

Senator **Mitchell**. Mr. Blair, do you want to comment further on that? Did I accurately state it?

Mr. **Blair**. No, sir. I think you stated the difference accurately.

Senator **Mitchell**. Let me ask you, Mr. Huey first, and then invite both Mr. Blair and Mr. Williamson to comment, what do you think about the administration's proposal to provide no funding for State matching grants under section 6?

Mr. **Huey**. Mr. Chairman, we quite obviously object to that. We feel that the States have assumed significant responsibilities with the passage of the act in 1973. We haven't had the kind of assistance we needed to accommodate those responsibilities. We have accommodated them nonetheless with our own resources to the best of our ability. I think we have done a very good job. Our State has an endangered species program. We are one of the first States to enter into a cooperative agreement with the Fish and Wildlife

Service. We have a State list of threatened and endangered species that is pretty extensive. It gives us an opportunity to maintain knowledge of proposed listings by the Federal agencies.

As I say, it is very difficult. When we went to our State legislature this year, the first motion in the house appropriations finance committee was to give $1 for endangered species. After quite a bit of testimony, we were able to get the amount that had been recommended by our legislative finance committee into the bill. It wasn't as much as we had requested.

It is very difficult for us to get funds for endangered species because, as I said before, we are working with a constituency that is concerned about credibility. We have to demonstrate to those people that what we are doing is justifiable and useful. We could use the money. It would help us a lot.

Senator **Mitchell**. Mr. Blair, do you want to comment on that?

Mr. **Blair**. I can only repeat what I said, Senator, which is we think it is a very false economy. There is no better place where a dollar could be used in this program than encouraging the States. I don't think it is widely realized—I can't make a sweeping statement on this, but it is quite probably true that more work is being done by and for the States on inventories than by any other agency. There is no national inventory. This is the closest thing to it—the State inventories, where they exist.

I am an interested party. The Nature Conservancy has helped to bring 27 of those inventories into being. But if it weren't for them, we would have precious little knowledge to start this program from. For the Federal Government not to encourage that process and to get, you know, something more than a dollar's worth for a dollar of appropriations seems to me to be a serious misjudgment.

Senator **Mitchell**. Mr. Williamson?

Mr. **Williamson**. Senator Mitchell, back in 1973 when this act was passed, the Federal Government took away some of the authority that the States had over wildlife, that for endangered species. We objected to that. The States objected to that.

Part of the compromise at that time was that the Federal Government would set up this program to provide matching funding to the States so that they can carry out their duties under the act. As you know, that promise hasn't been kept, and we think there is a commitment on the part of the Federal Government to the States dating back to 1973, and that commitment should be kept.

Senator **Mitchell**. So from your standpoint, failure to fund the section 6 program represents a breaking of faith by the Federal Government.

Mr. **Williamson**. Yes, sir. That is the way we view it.

Senator **Mitchell**. Thank you. No further questions, Mr. Chairman.

Senator **Chafee**. Thank you, Senator.

Mr. Williamson, in your testimony, you say "Control of this Nation's wildlife should remain in the hands of U.S. agencies, both Federal and State. We should not permit multinational authority over our wild plants and animals to occur." I am not sure if we follow that rationale what we are doing in CITES in the first place.

Mr. **Williamson**. What you are doing in CITES, I think, Mr. Chairman, is trying to get some control over the international trade in endangered and threatened species of plants and animals. It is not to get control and interfere with international trade in non-endangered species of plants and animals. When you get out of the area of endangered and threatened into the area of nonendangered and threatened, you are beginning to affect management programs unwisely, in our view. I think the bobcat is a good example. It has been very disruptive of our management programs here. It has caused divisiveness between Federal and State agencies in this country. It has interrupted commerce to a certain extent.

Senator CHAFEE. That may have been true in the past. I am not going to concede or deny that point. But in any event, we have attempted to remedy it with the language you suggested as revisions.

Let's assume we accept your language. Where are we then as far as CITES goes?

Mr. WILLIAMSON. I don't really know. I don't know whether it would be immune from court action or not.

Senator CHAFEE. Let's assume that this language would stand the court challenge.

Mr. WILLIAMSON. Where would we be as far as CITES?

Senator CHAFEE. Are you satisfied then?

Mr. WILLIAMSON. Yes. I think the bobcat situation would be solved.

Senator CHAFEE. All right. Gentlemen, we thank you for testifying here. We appreciate it.

Mr. WILLIAMSON. Thank you, Mr. Chairman.

Senator CHAFEE. The next panel is Dr. Faith Campbell of NRDC, Dr. John Grandy of the Humane Society, and Mrs. Christine Stevens. If each of you would come up.

Dr. Campbell, we will start off and hold everybody to 5 minutes. Why don't you proceed. There will be questions for the panel as a whole at the end.

STATEMENTS OF FAITH CAMPBELL, NATURAL RESOURCES DEFENSE COUNCIL; JOHN GRANDY, THE HUMANE SOCIETY OF THE UNITED STATES; AND CHRISTINE STEVENS, SOCIETY FOR ANIMAL PROTECTIVE LEGISLATION

Ms. CAMPBELL. I am sorry. I was told copies of my testimony did not get up here in advance.

Senator CHAFEE. It is here now. Go ahead.

Ms. CAMPBELL. I am addressing the plants today, so-called lower life forms which are the underpinning of the entire ecosystem. I am going to focus on the question of the taking of plants since I have already submitted written testimony about the importance of conserving plants generally.

The act recognizes overcollecting as a significant cause of endangerment for certain types of plants. It seeks to reduce this threat by prohibiting interstate and foreign commerce and exports and imports of listed plant species. We also believe that section 7 of the act requires Federal land-managing agencies, to regulate collection of plants found on their land.

Unfortunately, neither of these provisions is adequately implemented at this time. I have cited a number of examples of listed species which are said to be in commercial trade today. One is the

Neolloydia mariposensis, a cactus that is threatened. Another is the green pitcher plant (*sarracenia loreophila*) from Alabama.

Furthermore, the Bureau of Land Management still does not have a policy regulating the collection of plants from BLM land. I would point out BLM manages the habitats of virtually all of the protected cacti and several other of the species which are listed and are extremely sought after by collectors. We consider this inadequate.

Unfortunately, correction of these two implementation problems will not eliminate the threat posed by collecting to rare plants. Hobby collecting by individual plant fanciers and botanists who trade among themselves is a serious cause of depletion. Therefore, we ask the committee to adopt amendments that would prohibit the collection of listed plant species for the purpose of possessing them and require Federal land-managing agencies to regulate the collection of plant species for which there is a large demand which threatens to cause their depletion.

These amendments are logical extensions of the act for they would help to curb or regulate a recognized cause of endangerment and thus perhaps reduce the number of species that must be listed under the act.

According to experts on the trade, collectors who seek the extremely rare species are usually sophisticated individuals who often dig the plants themselves and trade them among their friends. Thus they are not engaged in a commercial trade which is now regulated.

We of course have no direct knowledge of how large this trade is. There are some indirect indications that it could be large. The American Orchid Society has 20,000 members; the Cactus and Succulent Society has 7,000 members; the Carnivorous Plant Society has over 1,000 members. Some portion of these society memberships seeks the extremely rare plants.

For some specific examples, in the last year eight or nine clumps of the endangered green pitcher plant have been taken from the bog shown on this calendar by private collectors. A botanist can name seven individual people who have collected green pitcher plants since the mid-1970's. Only one of these is in the commercial carnivorous plants business. The rest are hobbyists.

Several of the *Pediocactus* species from the Southwest that are already listed as endangered or threatened are being collected now. Particular concern is expressed for the *Pediocactus knowltonii.*

Other listed plants are known to be in collections, but the date of their removal from the wild is not known. The *Echninocactus horizonthalonius* var. *nicholii* is known to be in six collections in the State of Arizona alone. Other species are known to have been widely collected at the time of their listing, but whether this pressure continues for them has not yet been determined.

Attached to my testimony are two tables from the recent TRAFFIC report on international trade in plants. The first lists nine listed cactus species that were reported as exports in 1977–79. My testimony outlines some of the deficiencies in the CITES data which indicates the trade is much larger than that so reported.

The second table records a survey of 19 cactus catalogs for the period 1978–79. Ten of those 19 were selling species listed in November of 1979, at that time some of them in large quantities.

It defies commonsense to allow continued collecting of these listed species that undermines the other protective provisions of the act. We ask economic interests to accept sacrifices in protecting their habitat. I believe we should ask the botanists and hobbyists to accept the lesser sacrifice of not digging the plants up.

Many of the candidate plant species are as close to the brink of extinction as those already on the list. They are not listed merely because the Interior Department does not have the manpower to do the paperwork and under its priority system is allegedly no longer listing plants. About one-quarter of the American cactus species has been recorded in the minimally acceptable trade data. Over one-quarter of the American cactus species are considered endangered or threatened, that is, already listed or they are candidates for listing. Eleven of these candidate species show up in the CITES data for 1979 shown in the first table. Other types of plants are also collected but the data are not as good. The mountain sweet pitcher plant in North Carolina, for example, there are 15 clumps of it in one botanical garden. There are others such as the *Lewisia* in the Northwest, Washington State, for example. Many of these candidates and other heavily traded species are collected from Federal lands in the West. Arizona, for example, has 44 percent; Colorado, New Mexico, 37 and 33 percent; Nevada and Utah——

Senator CHAFEE. Dr. Campbell, can you wind up here?

Ms. CAMPBELL. Sure.

My argument in this final position is that by allowing continued collection of candidate species, we are driving them to extinction before they can be listed. By allowing overcollection of other species, we may be reducing them to the point where they should be listed and thus imposing burdens on society that are unnecessary. Therefore, I believe we should have an amendment to the act to require Federal landowning agencies to issue permits based on scientific determination for collecting of plants. And I believe, as in the case of the Lacey Act, the CITES list provides a good overall indication of which species are in need of protection.

Senator CHAFEE. Thank you, Dr. Campbell. When we were considering the Lacey Act changes, I remember your testimony. I hope the Lacey Act has done some good in this important area. Has it?

Ms. CAMPBELL. I think it will. The Fish and Wildlife Service hasn't built up its enforcement mechanism, but it will make an effort.

Senator CHAFEE. Why don't we proceed with Mr. Grandy and then Mrs. Stevens.

STATEMENT OF JOHN W. GRANDY

Mr. GRANDY. Thank you, Mr. Chairman. My name is John Grandy. I am vice president for Wildlife and Environment of The Humane Society of the United States and am president of Monitor, Inc. the consortium of animal welfare, environmental, and conservation groups. I appreciate the opportunity to testify in these hearings on behalf of the Humane Society, the National Parks and Conservation Association, and the Defenders of Wildlife, where I was for 6½ years executive vice president and where I brought the bobcat litigation, which is the subject of much of the discussion we have heard this morning.

Our view on issues other than the bobcat issue are presumably being addressed in the testimony of Mike Bean and Ken Berlin before this subcommittee on April 22. For that reason, we will limit our remarks here to the bobcat issue.

Initially we regret the image which the numerous witnesses opposing bobcat protection in CITES tend to present. Indeed, with the volume of testimony being delivered in opposition to CITES protection for the bobcat and my 5-minute time limitation, one might think this protection a travesty. Nothing could be farther from the truth.

Bobcat protection, as our remarks will demonstrate, is both appropriate and mandated under CITES. For these reasons, and others which follow, while we applaud the effort of this committee and you, Mr. Chairman, in particular, we are deeply distressed by, and strongly opposed to, the portion of the proposed amendments offered by you and Senator Mitchell and others which override the legally mandated interpretation of CITES and would likely remove important protection for the bobcat.

Numerous arguments have been leveled at the court decision mandating compliance with CITES, at bobcat protection under CITES, and indeed at CITES itself. A few moments ago one witness I thought likened bobcat protection to the civil disruption caused by the Civil War. All of these arguments you have either heard today or will hear from witnesses which follow me.

However, lost in all of the rhetoric are the reasons why bobcat protection under CITES is appropriate and necessary. My discussions of these reasons, necessarily brief, follows. I will just hit the major couple of reasons and then stand for questions, if that suits you, Mr. Chairman.

Senator CHAFEE. All right.

Mr. GRANDY. The court of appeals decision is consistent with modern-day wildlife management. Numerous arguments by fur trapping interests, the International Association of Fish and Wildlife Agencies, the Wildlife Management Institute, and others, are claiming that reliable population estimates cannot be obtained and that the court established requirements threaten wildlife management in this country.

Under scrutiny, these arguments can be seen for what they are—scare tactics, motivated by a desire to circumvent the requirements of CITES in order to kill and exploit unlimited numbers of bobcats.

It is important initially to understand what the Court of Appeals said about population estimates. The court specifically rejected as unrealistic head counts of animals but, rather, required reasonably reliable estimates of population numbers. Further, the court did not specify which of the many available technologies for estimating populations should be used or what factors should be considered in establishing reliability. This was left to the discretionary agency.

Now we have the Government, the fur industry, trappers, hunters, and the International Association of Fish and Wildlife Agencies all protesting that determining reliable minimum population estimates is impossible and that they must have legislative relief. The bottom line of this position for Federal and State agencies is readily apparent from the fact that the Wildlife Management Techniques Manual, the bible of professional wildlife managers in this country, contains chapters devoted to standardized techniques for estimating population size. Moreover, the manual asserts, and I quote, "The methods of estimating numbers of animals have now achieved a level of sophistication worthy of a mature science."

Indeed, in hearings on the Fish and Wildlife Conservation Act of 1980, held before this subcommittee, the International Association of Fish and Wildlife Agencies' representative expressed the unanimous support of all fish and wildlife agencies for a law which required population estimates for nongame species. You, Mr. Chairman, even questioned the State agency witness on the desirability of these requirements. In my view, Mr. Chairman, it destroys the credibility of the International Association and others when they now ask us to believe that they are prepared to do population estimates for bobcats if it is a nongame animal, but they are not prepared to do population estimates if it is subjected to unlimited exploitation.

Senator **Chafee**. Your time is up, Mr. Grandy. This is an important subject, as are all of them, so why don't you take a couple more minutes.

Mr. **Grandy**. All right. I will summarize it.

The expense of bobcat protection under CITES, which is the other major argument which has been leveled at this, I want to discuss for just a moment. There are at least two ways in which management programs for bobcats and other CITES species might appropriately receive additional funding. First, and least desirable, to the extent that Congress finds additional responsibilities on State fish and game agencies to be excessive, Congress could appropriate additional sums for these agencies; specifically, for improving management programs.

Mr. Chairman, a second and more appealing source of funding for these management programs would be to tax or charge those responsible for making the programs a necessity. You must recall that it was neither Defenders of Wildlife, the Humane Society, the court of appeals, or CITES itself which required CITES protection for the bobcat. Quite the contrary. It was furriers, trappers, and associated interests which killed or directly contributed to killing such large numbers of bobcats for the European fur markets as to make CITES protection a reality. It follows logically then that the costs necessary to provide the type of management program which is clearly necessary to meet our international obligations under CITES is best and most appropriately borne by those who are reaping the substantial profit from mass and inhumane exploitation of these species.

In conclusion, Mr. Chairman, we commend you and Senator Mitchell for your support on endangered species and the Endangered Species Act. However, for the reasons I have presented and which are contained in more depth in my statement, we strongly oppose the portions of your bill which override the court of appeals decision and weaken protection for the bobcat. Therefore, we respectfully urge that you and your colleagues reevaluate your amendments and reject any amendment to the Endangered Species Act which would alter our international and national obligations.

Thank you.

Senator CHAFEE. Thank you, Mr. Grandy. Obviously there will be questions.

Mrs. Stevens, we welcome you again. You are a witness who has testified here many times and always with penetrating observations. We look forward to hearing your testimony.

STATEMENT OF CHRISTINE STEVENS

Mrs. STEVENS. Thank you, Mr. Chairman. I must agree with Dr. Grandy about the bobcat situation. We believe that the act should just remain exactly as it is now in this respect. A tremendous number of efforts and a long period of time has been taken to try to create an amendment that would be acceptable to all. This has failed. The existing law is perfectly good, perfectly clear, Article 4 of CITES is all that you need to make a decision on what needs to be done, and not only for the bobcat. It is called the bobcat issue now, but we must remember that there are many other creatures that are going to come under this same type of situation. It is very important that we not weaken CITES and undermine it in any way.

Most species becoming extinct are in other countries. If the United States insists upon requiring a reservation because certain States object, a precedent would be established which could undermine the entire convention. Suppose every province or every other geographic entity in all the 77 member countries insisted upon such powers over their member nations at the parties? You just wouldn't have a convention at all. It would be totally unworkable.

It is important to realize individual States are doing good work to protect native species within their borders. They however are not here testifying. So what you are hearing is from large groups taking the position that they represent the States.

For example, Lonnie Williamson says that we should have the word "accepted" put in instead of "reliable." Well, accepted by whom? After all, Dr. Grandy has a Ph. D. in wildlife management, too. He doesn't seem to accept it. I do not. I don't think it is something that ought to be put into a Federal law: To select one particular profession and put it into a position of making these decisions.

What we are dealing with here actually, of course, is a States rights issue. We had the same problem in CITES over the parrots. Although the trappers and furriers are extremely worked up over the bobcat issue because of the very high prices available at the present moment for bobcats, the pet trade was just as much worked up over the listing of parrots. They wanted the United States to file a reservation, because of commercial reasons.

These are the reasons that people want the United States to file reservations to start wrecking a really important international treaty—one that the United States, in fact, had the greatest influence in founding and in developing up to the present time.

I guess I have some more time.

Senator CHAFEE. That is all right. You have some more time, Mrs. Stevens. We will give you a little extra, if need be.

Mrs. **Stevens**. I would ask to have my statement put in the record and say that I am delighted that at least 3 years is what is required in S. 2309. But we would like to move a little further and say 4 years. It seems to me, Mr. Chairman, we come back over and over again. Every time people come here trying to tear the act apart, and must we leap onto the barricades again. It is an important act. After we heard those scientists at the oversight hearings talking about species of plants and small creatures, millions of them in the rain forests, for example, all over the world, that are becoming extinct even before they have been discovered we know we have to have a strong act and a strong convention. Otherwise the whole world, is in effect going to fall apart.

I am not a scientist. My word as to the potential value of these species means nothing. But you have heard these scientists. We can't let these things just erode and slip away.

In my testimony, I have quoted different newspapers, the New York Times, talking about the diversity of gene pools. As they point out, without foreign germ plasm our farmers would supply little but cranberries, pecans, and sunflower seeds. That is not what we need.

The Los Angeles Times urges that the committee extend the Endangered Species Act without change.

I would like to add that although we recognize that ICAC has no funding, we recommend against eliminating it entirely as proposed in S. 2309. It is useful for the Secretaries of Interior and Commerce to receive information and opinion from other agencies concerned with endangered species. Without funding at this time there is no cost to the Government. It would not save tax funds. Scientists and administrators with views which may differ from the two main agencies should have a means of communicating, as provided by ICAC.

We do support all the comments which will be made by Michael Bean of the Environmental Defense Fund, and I would like to emphasize the importance of implementation of the Western Hemisphere Convention.

I would conclude by saying that the group of proposals which their originators have so grossly mislabeled "the commonsense amendments" are designed from beginning to end to subvert the act. There is nothing sensible about enfeebling this modicum of protection. Sawing off the limb on which humanity is perched, as Dr. Paul Ehrlich so graphically put it, denotes folly rather than commonsense. Selfish interests that put the preservation of natural diversity far below their own commercial or recreational desires should not be allowed to destroy any part of the Endangered Species Act.

Thank you, Mr. Chairman.

Senator **Chafee**. Well, Mrs. Stevens, I think you made your point clear there. Let me ask you this. I would like to address this question to you and Mr. Grandy.

In his testimony, Mr. Colson of the State Department said:

> The first and most important is the proposed amendment at Section 8 of S. 2309 to amend Section 8A(c) of the Act concerning the functions of the U.S. scientific authority in implementing CITES. We believe this proposal is consistent with our international obligations under CITES.

Then he goes on,

> We believe the approach of S. 2309 of giving the Secretary of the Interior some flexibility in making no detriment determinations is consistent with the international process and our obligations under CITES.

I think you will find this subcommittee very strongly in support of CITES. We believe the United States has a leadership role. We don't want to undermine that. We have a situation under the bobcat that there are views expressed one way or another, and therefore, we have come up with this language which the people most directly involved certainly in the State Department believe is perfectly acceptable without undermining CITES. What do you say to that, Mr. Grandy?

Mr. GRANDY. My view of that is that it might not have once undermined it, Mr. Chairman, but the situation in which we are currently finding ourselves is that other nations are going to view it that way, and indeed, all of the people here view it that way or many of them who have come here and testified that that will indeed provide the fix. Anything that provides a fix is going to be seen internationally as undermining this Nation's participation in CITES. We were the leaders of it. Our courts have presented a logical and rational interpretation of CITES. When word comes to the international arena that our Congress has been begged and indeed pushed and indeed shoved into providing an unwise legislative fix for a rational court decision, I don't see how any nation can view that but as a step backward in terms of this Nation's international obligations.

Senator CHAFEE. You say we have so testified to this. A representative of the Secretary of State gave very strong testimony on this subject. It seems to me we can't totally dismiss it.

Mr. GRANDY. Well, I am not asking you to dismiss it, sir. I am asking you to understand that he is under the same political pressure you are under and indeed has inspired the amendments which have been proposed.

Senator CHAFEE. I am hardly under political pressure coming from the State of Rhode Island on this matter. So I have felt no political pressure. What we are trying to do is to arrive at an act that recognizes our international obligations, continuing our leadership, and an act that will pass and receive acceptability not only from this committee but also from the Congress as a whole.

Mrs. Stevens, do you have any comment?

Mrs. STEVENS. Yes; I thought Mr. Colson's remarks about not requiring reservations were excellent. I agree with those entirely.

However, his remarks about the bobcats specifically, I think, indicate he simply doesn't understand the situation. First of all, there is an effort by the State Department and Interior to get the other countries to agree to delist the bobcat by a mail vote. But the first effort failed because two countries objected. In the next vote a two-thirds majority is required. It may well be put off to be talked about at a meeting of the parties, and very properly. We said that would happen. We told the State Department in no uncertain terms, but they said, "We are going to do it anyway." Really, bobcats are not State Department kinds of creatures. They have only been pushed into this position because of the value of their fur. It puts the United States in an embarrassing position, as if we were an underdeveloped country, and couldn't get our hands on enough money, so we had to start going far beyond what we should in exploiting our own wildlife to get money in international trade.

Now, that is the very thing that CITES has been written and ratified by 77 nations to stop. We have fallen behind the underdeveloped nations who have now taken a very strong conservation line. They have been voting—at the last two meetings of the parties—against the United States because we are taking anticonservation positions. We are not leaders anymore, let's face it. We were to begin with, but we are not now. We are losing.

Senator CHAFEE. I hardly think we are eviscerating the language here when we talk about best available biological information derived from reliable or accepted, or whatever language we come up with, wildlife management practices. I don't want to take any more time on it. I have had my questions. I didn't mean to cut you off, Mrs. Stevens.

Mrs. STEVENS. Could I just say one thing. The fact that it would be eviscerating is because it would reverse the court decision which in turn would be seen by the international community as an act against CITES. It is not the words themselves, but the action.

Senator CHAFEE. Senator Gorton?

Senator GORTON. No questions.

Senator CHAFEE. Senator Mitchell?

Senator MITCHELL. Mr. Grandy, I would like to discuss in a little detail the bobcat. You have used some very strong language leading up to and concluding it was an unwise legislative fix, not only suggesting that the only reason for it is political pressure. I would like to begin by contrasting your statement on the events of 1976 which led to the listing of the, is it Felidae?

Mr. GRANDY. Yes, sir.

Senator MITCHELL. Is that the proper description?

Mr. GRANDY. Yes, sir.

Senator MITCHELL. And I contrast that with Mr. Huey's statement. In the first place, you obviously rely on that very extensively, in building your position. That is the crux of your argument. Mr. Huey describes the proceedings in his statement:

> In the first conference of the Parties in Berne in 1976, the family Felidae was added to Appendix II on the basis of no biological or trade information whatsoever.

This is Mr. Huey

> I repeat: the entire family Felidae, which includes a number of common species of cats, was added to Appendix II on the basis of no biological or trade information whatsoever.

Your statement tends to confirm that. You quote from apparently the appendix. You state:

> All cats are potentially involved in the fur trade and the scale of this trade is such that all species must be considered as vulnerable, few populations now remaining unaffected——

Mr. GRANDY. That is from the United Kingdom statement.

Senator MITCHELL. That is from the presentation.

Mr. GRANDY. That is correct. But I would just indicate that that does not in my view in any way confirm Mr. Huey's statement whatever.

Senator MITCHELL. First off, you disagree with Mr. Huey's contention.

Mr. GRANDY. I absolutely disagree.

Senator MITCHELL. Although that statement surely does not represent—the statement I quoted, obviously not the entire presentation—does not represent specific scientific or biological or trade information.

Mr. GRANDY. That specific statement itself does not. It represents a summary, as I understand it, of such information presented in more than 2 days of hearings at the 1976 meeting on this and other matters. The facts are essentially as I have presented them, Senator, that the United Kingdom is a major importer and a leader in the EEC and is in a position to know of the increasing volumes of trade that were occurring with respect to unprotected spotted cats, the major end spotted cats having been protected previously when the treaty was formed in 1973.

That information, that is to say increasing trade, I don't know whether you would call that biologic or economic or scientific or what kind of data it was. The fact is that the trade at that time in bobcats, lynx and other unprotected cats was known to be increasing dramatically and that is why the bobcat was listed, very properly. That is what the treaty is there for.

Senator MITCHELL. What the Court of Appeals said, that quotas for the States had to be based on population estimates, that is the decision of the Court of Appeals.

Let me ask you a specific question. In your judgment, are population estimates the only appropriate method for determining the health of wildlife populations?

Mr. GRANDY. There are numerous techniques which can be used to evaluate population estimates or to evaluate populations. Let me finish, Senator. There are numerous of those available. However, we are talking of species under the CITES banner which are in massive trade. That is why they are listed.

The best of those techniques and indeed the only reliable technique when you are exporting massive numbers of animals is going to be a fairly good population estimate. The Court of Appeals referred to that as reasonably reliable, as I understand it. A lot of factors can go into determining reliability, and a lot of these are factors that wildlife managers use all the time. The court did not exclude those factors being used to determine reliability. But the fact is that when you are dealing, as you are in the case of the bobcat, with a population of an animal whose skin now, a little animal about so, is worth up to $650 or $700 apiece. The demand is excessive.

What we faced in 1977 and before was incredible amounts of trade, both legal and illegal. That trade itself had resulted in the near extirpation of the bobcat from a number of places. Indeed, the bobcat was fully protected in 12 States at that time.

So we are not talking about something that is necessary in every case, but it is necessary in the case where you are dealing with a population of an animal under such intense pressure.

Senator MITCHELL. I understand the point you are making. But you have gone far beyond the scope of the question. My specific question was, Are population estimates the only appropriate method for determining the health of wildlife populations?

Mr. **Grandy**. No. There are other methods.

Senator **Mitchell**. Now, I go further then to say S. 2309, including the amendments which you criticize, does not preclude the use of population estimates; isn't that true?

Mr. **Grandy**. As I understand it, that is true. But part of the problem that we are running into here, Senator, and you could see it in the testimony this morning, is you and Senator Chafee and others of you are using the best intentions in the world, saying fine, we ought to have reliable techniques. Now you have heard a lot of testimony they have to be acceptable. They can be unreliable as long as they are accepted.

The problem is that it seems to me in any event, no one is going to be happy with this until they are in a situation, at least of the adverse interests we have been talking about, that have been testifying here, no one is going to be truly happy with this until they are in a position where nobody can bring any sort of challenge to their actions whatsoever.

Senator **Mitchell**. I understand that. But you continue to stray in your responses to my questions. The first question was a population estimate, which you confirm is not the only appropriate method for determining health of a population. In any event, S. 2309 does not preclude the use of population estimates.

Is it not also true that CITES itself does not mandate the use of population estimates?

Mr. **Grandy**. It clearly anticipates them.

Senator **Mitchell**. It does not mandate them.

Mr. **Grandy**. I am not a lawyer, Senator.

Senator **Mitchell**. The point I am getting at——

Mr. **Grandy**. It mentions them on a number of occasions. I would let the court decide that one.

Senator **Mitchell**. Believe me, I don't think being a lawyer is a prerequisite to anything. And I say that having listened to more lawyers than anybody.

What I am suggesting is that the amendment is a very narrow one, one I believe does not lend itself to the kind of sweeping condemnation that some of your words have suggested. It limits itself merely to overturning a decision that mandated population estimates as a basis for establishing quotas for bobcats.

My point is that CITES does not mandate population estimates. This bill does not preclude the use of population estimates. There are other reliable methods of estimating the health of wildlife populations. Those are permitted under this legislation. So the amendment is very narrow in scope and has as its intention merely to eliminate or to reverse the decision which said that you must use this one method.

Mr. **Grandy**. I understand your point. I guess I think the court did interpret CITES as requiring population estimates, reliable population estimates. As I said earlier, there are reasons that——

Senator **Mitchell**. If they did, the court was wrong, wasn't it, in having adjudged itself—I can testify they do make mistakes.

Mr. GRANDY. I was not aware you had been a judge. I guess I have to feel as a non-lawyer that we ought to live with the judges we have.

Senator MITCHELL. I used to think that way.

Mr. GRANDY. But I would say that for the reasons that I have given, particularly in the case of a heavily exploited species, which is the bobcat, and those covered by CITES generally are, I think the Court of Appeals decision and indeed CITES protection as given and not as you all have proposed is appropriate.

Senator MITCHELL. Time is running out. Thank you, Mr. Grandy.

Mr. GRANDY. Thank you.

Senator CHAFEE. We will have two other witnesses. We thank each of you. We welcome you back. You have always done a good job. We appreciate your testimony today.

The last panel will be Steve Boynton, American Fur Resources Institute, and Mr. Duane Smelser, Safari Club International.

Mr. Boynton, have you submitted written testimony?

Mr. BOYNTON. Yes, I have.

Senator CHAFEE. All right. Why don't you proceed.

STATEMENTS OF STEVE BOYNTON, AMERICAN FUR RESOURCES INSTITUTE, AND DUANE SMELSER, SAFARI CLUB INTERNATIONAL

Mr. BOYNTON. Thank you, Senator. I will constrict this, realizing the time problem.

My name is Stephen Boynton, Washington Counsel for the American Fur Resources Institute. I am also submitting testimony today on behalf of the Fur Takers of America and the National Trappers Association.

Mr. Chairman, there are over a half a million men and women of all ages who are trappers in the United States. Obviously, therefore, these people have a strong interest not only in the work of this subcommittee and Congress on the reauthorization of the Endangered Species Act but in maintaining professional standards of scientific wildlife management practices in order to preserve and protect our wildlife for today and the future.

We appreciate the opportunity to appear before the subcommittee and would specifically like to applaud the change proposed in section 8. In contrast to the people who have testified in the last panel, we feel this is a very positive move and undoes the harm caused by the court decision which erroneously held that "a reliable estimate of the total number of bobcat and the number of bobcats to be killed in the season" must be established before a "no detriment" finding could be made permitting the export of such pelts.

I might comment parenthetically we think one of the problems in the discussion of this that took place in the last panel is we are looking to substituting wildlife management standards for a judicial opinion, therefore, putting it back with the professionals who will determine what number of criteria will be used in setting animal harvests.

What it does, it does not place reliability on one criteria but limits it to the choice of professionals.

We would make two suggestions in this regard, Mr. Chairman, that have been spoken to in previous panels, starting with Assistant Secretary Arnett.

We would suggest the word "reliable" be removed and possibly the word "scientific" be substituted. However, the suggestion that Mr. Williamson made I think is more in keeping with established standards that have been used in other regulations.

For example, in the Federal Aid to States and Fish and Wildlife Restoration, the phrase used in similar context used the words, "designed in accordance with accepted fish and wildlife conservation and management practices * * *." In a recently proposed regulation for the Fish and Wildlife Conservation Act, the phrase there used was, "utilizes accepted conservation and management principles * * *."

We feel that these would be far more in keeping with established practices, and we believe that the decisions made under such language would withstand any court challenge.

The second suggestion, and we feel a very important one, concerns the retroactivity of this amendment. Through the court proceedings, the court ruled no exports could take place after July 1, 1981. If the Congress determines that the standard applied by the court was inappropriate now, clearly it was inappropriate when the court so ruled. Consequently, we suggest that language either be placed in the bill or committee report to permit the standards to be retroactive, which would allow the export of bobcat pelts during the 1981-82 season. Because of the court decision and the understandable inability of the Fish and Wildlife Service to write regulations based on the criteria that the court promulgated, pelts again during that season cannot be exported. Consequently, the prices were extremely depressed, and it was estimated that approximately $5 million was lost by the trappers.

Although this may seem a small amount in the total scheme of our economy, trapping is an important income-producing activity for those involved.

Mr. Chairman, I have commented on other points in my written testimony. I will skip over that. I would just like to say we support the changes in the proposed legislation concerning the needed accelerated listing and the exemption processes. We also believe the change made concerning experimental populations is a positive measure.

Further, we believe the elimination of the International Convention Advisory Commission is an important step.

In sum, we are extremely pleased with the proposed legislation and again congratulate the members of the committee and the staff for their dedicated and understanding efforts on behalf of maintaining reasoned legislation for the maintenance of professional wildlife management, which I believe, Mr. Chairman, and members of the committee, is the key to what we are talking about on this bobcat amendment. It is a standard that professionals should have the opportunity to exercise.

Thank you very much.

Senator **Chafee**. Thank you.

We will hear from Mr. Smelser and then we will have questions. Mr. Smelser, welcome.

STATEMENT OF DUANE SMELSER

Mr. SMELSER. Mr. Chairman, it is a pleasure for me to be here. I am Duane Smelser, president of the Safari Club International, SCI.

SCI is a sportsman's group dedicated to the conservation of wildlife, the preservation of sport hunting, and the protection of hunters' rights. SCI represents the views held by our more than 1 million sportsman members, affiliates, and associates.

I sincerely appreciate the opportunity today before this subcommittee to present SCI's views and proposals on S. 2309.

Senator CHAFEE. Mr. Smelser, the Safari Club has testified here many, many times. We appreciate your coming. I have some trouble with the numbers that you indicate you represent, 1 million.

I saw a list, and I am not doing this in order to embarrass anybody, but I think that the Safari Club has nothing like 1 million members itself. I don't know what the membership of the Safari Club is. It is very limited membership, is it not? How many would you say actually belong to the Safari Club?

Mr. SMELSER. In the Safari Club International we are 15,000 strong. But we represent affiliates, as I said in my statement.

Senator CHAFEE. How do the affiliates work?

Mr. SMELSER. They are sportsmen of the United States who have affiliated with us. We represent them.

Senator CHAFEE. You mean if I belong to the rod and gun club at home, I am a member of the Safari Club somehow?

Mr. SMELSER. Very possibly. For example, the Michigan United Conservation Clubs [MUCC] has rod and gun clubs. They are affiliated with the Safari Club.

Senator CHAFEE. I see. All right. Go ahead.

Mr. SMELSER. Thank you, Mr. Chairman.

The sport hunter is the true conservationist. Rather, the dangers to wildlife are found in the continuing loss of habitat and the illegal profit-seeking poacher who has no regard for wildlife or the laws designed to conserve and protect such resources.

The Safari Club International fully supports the Endangered Species Act as one of the most important tools in the cause to conserve, manage and protect wildlife resources. SCI is pleased, on the whole, with the introduction of S. 2309 which proposes to reauthorize and amend the Endangered Species Act.

At this point I would like to comment on several provisions of S. 2309. I am going to delete something here.

Senator CHAFEE. All right, fine.

Mr. SMELSER. SCI endorses the proposal in S. 2309 to establish an "experimental populations" category for endangered or threatened species which are introduced outside their current range. Yet we are troubled that the proposed "experimental populations" category does not apply to similar wildlife conservation efforts undertaken by foreign governments and their wildlife agencies. Surely such laudable conservation projects are not less worthy of recognition by the members of this subcommittee.

Therefore, SCI recommends that the "experimental populations" be expanded to apply to foreign populations of endangered and threatened species and the efforts by foreign nations to introduce such species outside their current range.

SCI wishes to express its overall support to the proposal in S. 2309 amending the listing process under section 4 of the act. Inasmuch as we have proposed in our written statement certain technical changes to S. 2309, I would hope these suggestions would be carefully considered by the subcommittee.

Sportsmen are very familiar with the act and the actual manner in which it is implemented and enforced. I must inform this subcommittee that the act is frequently the source of much frustration to the American sportsman. Nonetheless, he makes every conscious and good faith effort to comply with the sometimes conflicting regulations.

I have attached as part of my written statement a number of proposed amendments which I respectfully request this subcommittee to carefully consider. The amendments are technical in nature. Therefore, in the interest of time, I will merely summarize them for you.

The amendments would grant explicit recognition to the wildlife conservation values of sport hunting. We feel this is long overdue. Several of the amendments seek to set in cement the understanding that sport hunting does not constitute commercial activity and, moreover, that proper regulation for hunting is consistent with the act.

One of our amendments proposes a provision whereby the U.S. Fish and Wildlife Service may not seize foreign shipments of game trophies in the United States if they were taken legally in the country of origin and may be lawfully possessed in the country of destination. We believe this issue of accidental landings deserves a statutory remedy.

At the present time, there are several species which are listed as endangered under the act, which because of the successful breeding and management programs, the surplus of such species can be legally taken by a sport hunter in the country of origin and lawfully exported from that country. However, due to the overall listing of the species as endangered under the U.S. statute, any importation of such game trophies into this country is prohibited. We propose an amendment which would permit importation of such surplus wildlife providing the species is lawfully taken as part of a recognized conservation or management program if that program is determined to be consistent with the act.

We are not promoting sport hunting of endangered species in countries where such is prohibited. Sport hunters would not, and by law, cannot, take and import such species. The amendment addresses only those surplus species in the countries where such sport hunting is legal, and then only in those specific cases where the country's management program can meet all the conditions imposed by CITES and the act.

Sportsmen are true conservationists. As a group we are one of the most ardent supporters of the act. Explicit recognition within the act itself of the values and contributions of sport hunting to proper wildlife management and conservation would go far in dispelling the omni-present paranoia among sportsmen that their historical right to hunt is threatened whenever a new or revised regulation or statute looms on the horizon.

I would like at this time to thank Senator Chafee for giving me the opportunity to present the views and proposals of the Safari Club International on S. 2309. I would be pleased to attempt to answer any questions regarding my testimony.

Senator CHAFEE. Thank you very much, Mr. Smelser, for your testimony and the points you raised here.

We will definitely delve into those matters you have testified about. Your organization has testified here many times and has been helpful to us. I appreciate it.

Mr. Boynton, I appreciate having your testimony. You didn't deal with it in your verbal testimony, but in the testimony you submitted, you dealt with the paperwork and the regulations that require reports, on page 5. Do you want to touch on that a minute, the export-import license requirements?

Mr. BOYNTON. Yes, Senator, briefly. In 1980, there was a regulation that was adopted which requires the exporter or importer of wildlife, of all wildlife, to have a license. There was an exemption for those operations that were doing less than $25,000 of trade. However, we have found out after this regulation being in place and talking with those people within the Fish and Wildlife Service and particularly in law enforcement that this regulation has produced absolutely no data that is of use to anyone.

For example, it requires an exporter, let's say, to have a license to ship red fox out of New York City to Europe. There is no information on any of the forms or any of the paperwork that shows where those red fox came from. Quite frankly, we believe the only reason this regulation is in existence is because of the law enforcement inspection without warrant permission.

To have it for endangered species and those species listed under CITES we think is absolutely mandatory, but to have it for all wildlife, when you are talking about a $1 billion industry, it just produces paperwork that is unnecessary and it is costly for the Government and costly for those who participate in it.

Senator CHAFEE. We will certainly take a look at it.

Gentlemen, thank you both for coming here. We will have further hearings on Thursday at 9:30. Thank you. That concludes today's hearing.

[Whereupon, at 12:40 p.m., the subcommittee was recessed, to reconvene at 9:30 a.m. on Thursday, April 22, 1982.]

[Statements submitted for the record and the bill S. 2309 follow:]

STATEMENT OF G. RAY ARNETT, ASSISTANT SECRETARY FOR FISH AND WILDLIFE AND PARKS, DEPARTMENT OF THE INTERIOR, BEFORE THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION, CONCERNING S. 2309, APRIL 19, 1982

Mr. Chairman, I appreciate the opportunity to appear before you today to continue the dialogue that has been taking place between the Department and the Congress concerning amendments to the Endangered Species Act of 1973. This is a highly complex, controversial law which, as you know only too well, provokes strong reactions in people on all sides of the issue. I want to start out by thanking you and members of your Subcommittee on behalf of Secretary Watt for your efforts to ensure that debate on these matters is fair and factual. In particular, I would like to thank Senator Gorton and Senator Mitchell for their continued interest in this matter, and especially for co-sponsoring S. 2309.

As the Secretary has stated to you, it is our position in the Department of the Interior that the Act should be extended for one year with any amendments limited to modifications which would streamline the section 7 exemption process and address problems identified by the States. Generally, I believe that S. 2309 fits these criteria. While we do have some recommendations concerning clarifying language, on the whole we heartily support your approach.

Before addressing S. 2309 I would like to digress briefly to bring you up to date on our efforts to improve administration of the Act through the regulatory process, because I believe our accomplishments will bear upon further consideration of endangered species legislation by Congress.

Our major efforts in this regard are now taking place via the regulatory review process being conducted by Vice President Bush's task force pursuant to Executive Order 12291. After conducting an extensive study and comment process last fall, the Fish and Wildlife Service identified a large number of issues relating to the Act which are of concern to the public. Option papers were prepared on 39 priority issues that identified specific regulatory and statutory actions for addressing existing problems. On the basis of this work, the Service recently submitted to OMB a regulatory revision work plan, delineating the specific time-table the Service will follow in implementing needed changes.

Nearly a dozen regulatory reform actions have already been completed. For instance, last November we published a final rule concerning the redefinition of the term "harm" as used in section 9 of the Act. Proposed regulations concerning disposal of forfeited or abandoned goods were published last September.

Although it is not specifically part of our formal regulatory review effort, the listing process is now back on track. In the last 4 years there have been a myriad of legislative and administrative requirements that affect the way species are listed under the Act. Some of these include amendments to the Endangered Species Act in 1978 and 1979, the Paperwork Reduction Act, and the Regulatory Flexibility Act. Obviously, there has been some confusion and delay as FWS has attempted to comply with what sometimes appear to be conflicting mandates. The Interior Department's Solicitor's office has recently provided guidelines concerning compliance with these requirements, however and the process is now well in hand.

In short, Mr. Chairman, contrary to what some may believe, we are not appearing before you today, empty-handed, 10 months after initiating our study of the Act, asking Congress to let us continue our study for another year. We have a plan in hand. We are asking for a year to see if it works. If it doesn't, we will come back and ask for your help in making it work. Every possible administrative remedy should be exhausted before asking Congress to make further major legislative changes in the Endangered Species Act.

With that introduction, the following is a discussion of specific recommendations on S. 2309.

Experimental Populations

Section 2 of S. 2309 makes a much needed change in the Act that will be important to the conservation of threatened and endangered species. Recovery of a species is key to ensuring its survival. There are some instances, however, where the Service has progressed as far as possible in recovery actions within current habitat boundaries. Existing populations are at carrying capacity in currently occupied habitat, or they exist only as captive species in a captive propagation program and need habitat for release. The captive bred population of the red wolf in the Tacoma, Washington zoo is a good example. One of the most effective measures that can be taken to ensure recovery of these species is reintroduction into their historical range. However, this is also one of the most difficult recovery tasks to implement. To have a successful reintroduction program, it is essential to have the cooperation of the State and, in some cases the private or Federal land manager. States, however, fear that stringent provisions in the present Act will alter or eliminate wildlife and land management options available in the introduction area and are reluctant to give their approval. States have also raised the concern that the Service may be required to declare critical habitat resulting in the removal of State control and prevent ongoing uses. As an example, the State of Colorado has hesitated in approving the introduction of the endangered squawfish into the Colorado River for fear that fishermen who inadvertently hook one of these fish could be subject to prosecution under the Act for "taking". An even greater concern is that the State fishery management program will be disrupted and the State forced to place priority on protection of the introduced endangered fish.

Federal agencies have voiced similar concerns and are often reluctant to give approval for reintroduction for fear of delay, alterations, or postponements of ongoing or proposed actions through application of section 7. TVA, for instance, has expressed concern about efforts to reintroduce the red wolf into the Land between the Lakes area in Tennessee without assurance that flexibility will be provided for the management of the species.

Section 2 of S. 2309 would help to address this very difficult situation by creating a new category of "experimental population". By authorizing the Secretary to issue special regulations for these species, the bill would provide the flexibility to fashion an administrative remedy to the problems raised.

There are three aspects of this amendment, however, where clarification would be helpful. First, the "not wholly separate" language contained in section 2(a) is somewhat confusing. Is it intended to address those situations where experimental populations of migratory animals, for instance migrating birds, join the main population? Or does it envision an instance where an experimental population rejoins the original population due to expansion? We agree conceptually with this intent, but believe it should be clarified, particularly for law enforcement purposes.

What constitutes a "non-essential" experimental population under section 2(b) also needs clarification. It may be assumed that in most cases experimental populations would not be essential, because the continued existence of the species as a whole would not be jeopardized by their loss. Some species, however, are at such critically low levels that any loss would be jeopardizing and so experimental populations of these species should be designated as "essential." The dusky seaside sparrow is an example.

Another question is whether the listing process set forth in section 4 of the ESA would be applicable to the designation of experimental populations.

Finally, while section 2 of S. 2309 does not specifically address the application of section 9 of the ESA to experimental populations, it appears that the Secretary would be able to apply or waive the provisions in Section 9 under the regulatory authority provided in section 2. Congressional clarification on the point might be helpful. The Committee should be aware that it is the intention of the Fish and Wildlife Service to promulgate such regulations at the time that the experimental population is established.

Federal Matching Share

Section 3 increases the Federal matching share for section 6 programs from 66 2/3 percent to 75 percent for single State programs, and from 75 percent to 90 percent for multi-state programs. At the present time, the Administration, as a general policy, opposes this type of grant-in-aid program. Since the Service is not requesting section 6 funds in fiscal year 1983, it is consistent with the President's budget to oppose any amendment increasing the matching share.

Listing

Section 4 consolidates and revises the current process for listing species and determining critical habitat. Although the Department supports efforts to streamline the process, the following recommendations and clarifications are offered.

Section 4(a) of existing law requires the Secretary to determine critical habitat "to the maximum extent prudent" concurrent with listing. Section 4(5) of S. 2309 expands this criteria to "the maximum extent prudent and determinable". It is unclear as to the intended interpretation of the term "determinable". If critical habitat can not be determined at the time of listing, but one can reasonably anticipate that such a determination could be made in the future, does listing proceed? If listing does proceed, will determination of critical habitat at a later date be prohibited?

It is unclear whether S. 2309 requires the Service to promulgate a separate special regulation for each threatened species listed. Present Service procedure is to promulgate special regulations only when all of the prohibitions of section 9 are not applied to threatened species. If present procedures for listing threatened species are to be modified by S. 2309, this should be specifically indicated. In addition, S. 2309 is unclear as to the effect of not promulgating a special rule concurrent with the listing of a threatened species. Does this preclude the opportunity to proceed with the listing, or to issue regulations at a later time? Some clarification would be helpful.

Changes contained in section 4(6) concerning the petition process are unclear as to the intended impact on the Service's priority listing system. Currently, within 90 days after receiving a petition, the Service must publish a status review of the species involved, provided the petition has presented substantial evidence. The petition is then factored into the listing priority system. Section 4(6) of S. 2309 requires the Secretary to determine within 90 days of receiving a petition whether it presents substantial scientific information. If it does, S. 2309 would then require a listing determination within 12 months after the petition is received. However, both the existing law and new section 4(b)(5)(F) of S. 2309 require the Secretary to take final action on a proposed listing within 2 years, or he may not propose it again without new information. Therefore, the effect of this change in the petition process could be to skew the Service's listing of species in favor of those the Service is petitioned to list rather than those in the greatest need of protection. This problem could be avoided with report language that specifies that this provision is not intended to affect the FWS priority system.

In addition, S. 2309 is vague as to the effect of failing to make timely decisions under section 4(6) and section 4(b)(5)(F). Section 4(6) could be clarified with report language specifying that if the Secretary determines within 12 months that he will not at that time proceed with the listing because it is not of high priority, he may still proceed with the proposal at some future appropriate time. NOAA has made a recommendation concerning resolution of the Section 4(b)(5)(F) problem, and the Service concurs with this. The Service also concurs with NOAA's comments concerning clarification of the terms "substantial scientific information" and "determination."

New paragraph 4(b)(2) appears to be duplicative of new paragraph 4(b)(3). The first requires the Secretary to regularly review the status of species which have been identified by professional scientific organizations as needing protection under the Act. The parameters of such a review are not spelled out, i.e. how often the review is to be made, which organizations should be contacted, and how this review is to mesh with the petition process. It may be the intent of the legislation to encourage the Service to maintain regular contact with outside experts and to seek their views regarding the listing of species. This is a desirable goal, and the Service is already achieving it. Thus, it is recommended that paragraph 4(b)(2) be deleted because of the extent to which it muddies the existing petition process.

Finally, section 4(6) of S. 2309 amends section 4(b) (1) of existing law to remove the requirement for conducting a status review prior to proposing the listing of a species. Status review is a useful tool in making initial determinations on the listing of species, and it is recommended that it be retained in section 4(b)(1).

Please allow me two other brief observations in regard to Section 4 of S. 2309. Paragraph 4(5) changes from 60 to 90 days before the effective date of a regulation the time in which the Secretary must give notice of the proposal. The assumption is that this includes 60 days for public comment prior to publication of the final regulation and 30 days from the publication of the final rule to the effective date. Clarification would be helpful. In addition, new paragraph 4(b)(5)(f) requires that listing determinations be made on the basis of biological criteria set forth in the Act. This is an acceptable provision, and is also the current practice. The Administration interprets this provision as allowing us to continue to comply with E.O. 12291 and applicable statutes in evaluating alternatives.

Exemption Process

The bill simplifies the existing Section 7 exemption process in two ways: it assigns to the Secretary of the Interior, or Commerce as appropriate, the responsibility for making threshold decisions and preparing the report to the Endangered Species Committee (ESC). It also decreases the amount of time involved in the process. Both of these changes are definite improvements over existing law. It is difficult to point to precise instances where project sponsors decided to forego their projects rather than go through a cumbersome, expensive, and time consuming exemption process. Nevertheless, there is some perception that the present process is entirely too lengthy. The changes incorporated into S. 2309 for the most part retain the integral elements of the existing process -- a fair balancing of economic and environmental factors — while at the same time shortening that process, thereby making it more accessible. There are, however, several issues which should be addressed.

Section 5(b)(7)(A) reduces the time available to conduct the study and issue the report from 180 days to 150 days. This may strain the ability of the Secretary to prepare the report, without expediting the exemption process significantly. Unless considerable information about the proposed project is already available, even 180 days is a rather limited period within which to conduct the study necessary to address the exemption criteria. This could be the first time that the economics of the projects and possible alternatives will be analyzed. This analysis is likely to be complex and so sufficient time should be provided for the Secretary to gather and analyze the relevant information.

The current exemption process takes 360 days to complete from the time an application is submitted. The process proposed in the amendment would take only 200 days: 20 days for the threshold decisions, 150 days for the report, and 30 days for the ESC decision. The Department recommends an alternative that would take only 210 days, while imposing a slightly less restrictive deadline on preparation of the report. This would be 20 days for the threshold decisions, 180 days for the report and 10 days for the ESC decision. Ten days should be sufficient time for the Committee to make their decision. The statutory deadlines are rigid, with no provisions for extension. From the time the threshold decisions are made, the Committee has 180 days notice that it will have to begin contemplating an exemption.

Section 5(b)(5) also raises concerns. This section elevates from a threshold decision to a decision made by the Committee, a determination of whether an irreversible or irretrievable commitment of resources was made by the exemption applicant. The Secretary's report is to contain a discussion of this matter, and the

Committee may not grant an exemption if the Secretary's report has concluded, and the Committee agrees, that there has been such a commitment. Given the importance of the matter, it seems desirable to have the Committee make the determination. However, postponing this decision until the end of the exemption process risks wasting both public and private resources and delays the final decision regarding the exemption. The Department recommends that the decision be retained as a threshold decision, but that the Committee members be notified of the Secretary's finding and be provided an opportunity to reconsider the decision if they disagree.

The next comment concerns section 5(a) of the bill, which strikes from section 7(e)(10) of existing law the sentence requiring that a Committee member's representative be a Presidential appointee. For clarification purposes, this sentence should be replaced by another introductory sentence indicating that members are empowered to appoint any Federal officer as their representatives.

There are several comments on section 5(b)(2)(C). This section directs the Secretary of the Interior to prepare the report to the ESC, except in those instances where he has rendered a jeopardy opinion. In such instances the Secretary of Commerce would prepare the report. It appears that this amendment is intended to avoid conflict of interest situations. However, it does not address a possible conflict of interest situation that may exist when either NMFS or FWS renders a jeopardy opinion for an action conducted by an agency of the other Department. For instance, if NMFS were to give a jeopardy opinion on a BLM activity concerning offshore leasing, it would be the responsibility of the Secretary of the Interior to prepare the report.

It appears that the threshold decisions are to be made by the Secretary who issues the biological opinion and receives the exemption application. However, this should be clarified.

While section 5(b)(2)(C) of S. 2309 refers to the Secretary of Commerce, it is the Administrator of NOAA, not the Secretary, who is a member of the exemption committee. Therefore, the question has been raised as to whether the bill's sponsors intended the Secretary or the Administrator to prepare the report. A clarification would be helpful.

Exception on Taking

Under current law, an action which has been granted an exemption is not considered to be a taking under section 4(d) or 9(a). While there is no explicit exception for actions which have received a favorable biological opinion, our Solicitor's office has concluded that section 7 contains an implied exemption from section 9 for incidental takings within the scope and nature of a project where non-jeopardy opinion has been issued under section 7. Nevertheless, a question still remains as to whether an agency or individual who has received a non-jeopardy opinion may be subject to prosecution or civil injunctive litigation for the taking of a species.

The Committee's efforts to resolve this apparent anomaly in the law are commendable. However, the Administration would like to defer taking a position on the provision until we have had an opportunity to review it more thoroughly. We will, of course, keep the Committee informed of our progress on the issue.

Convention Implementation

While the approach taken by S. 2309 in dealing with the "bobcat" problem is sound, the standard of "best available biological information derived from reliable wildlife management practices" is still somewhat vague. The Department recommends that this be changed to "best available biological information utilized in professionally accepted wildlife management practices." This standard is more likely to avoid future problems.

Enforcement

The Administration supports Section 9 of S. 2309, which authorizes the Attorney General to enjoin any person who is in violation of any provision of the Act. The Justice Department indicated that this provision will enhance the enforcement of the Act.

Authorizations

In lieu of the authorizations provided by Section 11 for the Department of the Interior, the Department recommends a 1 year authorization of $16,550,000, the amount contained in the President's fiscal year 1983 budget request.

Mr. Chairman, I think it would be inappropriate to let this hearing pass without congratulating you and the Subcommittee on your laudable efforts concerning the reauthorization of this important legislation. We have enjoyed working with you and your staff and are encouraged that we have found common ground in addressing the highly controversial issues that have been raised.

The Fish and Wildlife Service is now well underway in improving their implementation of the Act and would like to express particular appreciation for your continued support of these efforts. We look forward to continued close cooperation with you throughout the reauthorization process, and over the next year as we continue with our regulatory reform efforts.

Testimony of

William H. Stevenson

Deputy Assistant Administrator for Fisheries

National Oceanic and Atmospheric Administration

U.S. Department of Commerce

before the

Subcommittee on Environmental Pollution -

Committee on Environment and Public Works –

U.S. Senate

April 19, 1982

Mr. Chairman and Members of the Subcommittee:

I am William Stevenson, Deputy Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration. I appreciate this opportunity to provide the Subcommittee with comments on the Endangered Species Act Amendments of 1982 (S. 2309).

In testimony presented before this Subcommittee in December, 1981, and before the House Subcommittee on Fisheries and Wildlife Conservation and the Environment in March, 1982, I stated that the Endangered Species Act has worked well for marine species and that the few issues that the National Oceanic and Atmospheric Administration identified could be resolved administratively. Based on our experience with the Act and in compliance with Section 607 of the Congressional Budget and Empoundment Control Act of 1974, the Department of Commerce sponsored a bill (S. 2310) to reauthorize the Endangered Species Act for two years without amendments. We have reviewed the issues that have been identified during the reauthorization process. We hold to our original opinion and continue to recommend the passage of S. 2310.

Nevertheless, I believe that it is appropriate to provide this Subcommittee with comments on S. 2309 in the event the Committee believes amendments are necessary. Furthermore, the proposed amendments would affect the National Oceanic and Atmospheric Administration's programs and in certain cases may create confusion concerning the Department of Commerce's regulatory authorities under the Act. I recognize the importance of maintaining a statutory authority that protects fully the important species of animal and plant life which are or may become threatened or endangered. S. 2309 with some clarification does this.

My comments will deal with substantive issues only and will follow the order of S. 2309. I will provide technical comments for the record.

EXPERIMENTAL POPULATIONS

I suggest the proposed definition of experimental population be clarified. Additionally, I suggest appropriate language be inserted to indicate whether the proposed amendment requires the Secretary to issue permits for takings of experimental populations.

LISTING PROCESS

The National Oceanic and Atmospheric Administration opposes the suggested amendments to section 4(a)(2). The amendment authorizes the Secretary of Commerce to determine whether threatened species should be subject either to more restrictive or to less restrictive regulation and requires the Secretary of the Interior to "implement such action." The language provided would allow the Secretary of the Interior to re-write protective regulations promulgated by the Secretary of Commerce. Section 4(d) of the existing Act provides the Secretaries of the Interior and Commerce with the necessary authorities to promulgate regulations concerning listed species under their respective jurisdictions. The proposed language would not enhance such authorities and indeed may undermine the efforts of the Department of Commerce to promulgate regulations for the protection of threatened species under its jurisdiction.

The bill also requires the Secretary to designate critical habitat and to promulgate protective regulations for threatened species concurrent with listing. We believe the requirement to designate critical habitat may cause delays while the necessary information is gathered and the required analyses are conducted to make the designation. Further, we may have insufficient information to designate all of the critical habitat necessary for a particular species' survival at the time it is proposed for listing. If new information concerning critical habitat becomes available subsequent to that listing, the Secretary should have the authority to designate any additional critical habitat necessary for a species survival. We also make a similar argument for the promulgation of protective regulations. The Secretary should not be limited by the proposed amendment to promulgate regulations at the time of listing but should have the authority to do so as required for the protection of listed species.

Under the proposed section 4(b)(1) we suggest a requirement that a review of the status of a species considered for listing be conducted. I believe that such a review is necessary before the Secretary can make a decision on whether to list a species.

Under section 4(b)(2) of the proposed bill, the Secretary would be required to review regularly the status of species identified by professional scientific organizations or certain agencies of state and foreign governments as being in danger of extinction or likely to become so in the forseeable future. The National Oceanic and Atmospheric Administration believes that this proposed amendment is unnecessary and that it could result in precluding protection to the most seriously depleted species.

The amendment would require the Secretary to commit resources to review the status of the species identified by such organizations and agencies which may delay reviews of other species including those presented by petitions. This would give "professional scientific organizations" and agencies of state and foreign governments considerable influence over the listing process. I believe that the Secretary should consider information from such sources but should have the authority to decide for which species status reviews will be conducted. Furthermore, the petition process is available to such organizations. Finally, we note that the language of this amendment, particularly the terms "professional scientific organization" and "identified by," should be clarified.

The proposed bill also amends the petition process. The proposed deadline for determining whether a petition presents substantial scientific information and whether to propose the petitioned action are acceptable to the National Oceanic and Atmospheric Administration. We recommend that the meaning and underlying intent of the new "substantial scientific information" standard be clarified. The National Oceanic and Atmospheric Administration believes that listings of species should be based on biological factors and that "substantial biological information" would be a clearer and more appropriate standard.

In the case of an affirmative determination, we suggest the amendments clarify whether the Services should publish only their determination to propose the petitioned action, or the proposed rule as well, within twelve months of the receipt of a petition.

We find that the proposed language concerning the streamlining of the listing process could be more specific and suggest that the time schedules and actions be described more clearly. Specifically, it is unclear if the public hearing must be held within the 45 days following publication of the general notice. The provisions concerning the two-year limitation period also need clarification. Section 4(f)(5) of the existing Act requires either a final regulation adding a species to any list or a notice of withdrawal of the proposed regulation. Additionally, does "a final determination" refer to a final regulation adding a species to a list or to a determination to list a species or to some other action? There should be an indication of what happens if the Secretary does not undertake either action.

We oppose the deletion of section 4(b)(3) from the proposed bill. The Secretary should fully consider whether to list species that have been designated as requiring protection from unrestricted commerce by any foreign country, or pursuant to any international agreement.

EXEMPTION PROCESS

The National Oceanic and Atmospheric Administration has little experience with the exemption process and can offer only comments of a philosophical nature.

We agree with the need to avoid conflict of interest situations by having the Secretary who did not issue a biological opinion in a given case prepare the report to the Committee. However, the proposed bill should take into account situations where, for example, the Department of Commerce issues a biological opinion to an agency of the Department of the Interior. Under the amendments, the Secretary of the Interior would prepare the report on an exemption from his own agency. We believe this issue needs more study.

CONSULTATION PROCESS

The National Oceanic and Atmospheric Administration objects to the proposed amendment to section 7(b) that would include any license or permit applicant in determining an agreeable period of time in which to conduct consultation pursuant to section 7(a)(2). The consultation requirements pertain only to Federal agencies who whould determine the period of time required to meet those requirements. Federal agencies should be aware of the concerns of applicants during the consultation process and should extend that process beyond the 90 days provided in the existing legislation only when adequate consultations cannot be completed in that time.

EXCEPTION ON TAKING

When testifying before the subcommittee on December 8, 1981, I identified for the subcommittee the Department of Commerce's interpretation of the existing provisions of sections 7 and 9 of the Act. We believe that Federal agencies receiving "no jeopardy" biological opinions remain subject to the taking prohibitions of section 9. Our experience shows that such situations involving conflicts between these two sections arise very rarely. We have been able to handle such occasional situations by exercising prosecutorial discretion. The Administration has not completed its review of this issue and I cannot provide the Subcommittee with additional comments at this time. When that review is completed I will provide the Subcommittee with the results of our analysis.

ENFORCEMENT

We believe that the proposed amendment to section 11(e) expressly authorizing the Attorney General of the United States to seek injunctions against persons violating the Act provides a helpful clarification to the statute.

AUTHORIZATIONS

The National Oceanic and Atmospheric Administration supports the authorization of appropriations that were specified in S. 2310, the bill submitted by the Department of Commerce. These were not to exceed $2,179,000 for fiscal year 1983 and such sums as may be necessary for fiscal year 1984.

Mr. Chairman, this concludes my prepared statement. I thank the Committee for the opportunity to appear here today and I will try to answer any questions you may have.

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

STATEMENT OF

DAVID A. COLSON
ASSISTANT LEGAL ADVISER
FOR
OCEANS, INTERNATIONAL ENVIRONMENTAL
AND SCIENTIFIC AFFAIRS
UNITED STATES DEPARTMENT OF STATE

CONCERNING

REAUTHORIZATION OF
THE ENDANGERED SPECIES ACT

April 19, 1982

Mr. Chairman and Members of the Committee:

I am David A. Colson, Assistant Legal Adviser for Oceans, International Environmental and Scientific Affairs of the Legal Adviser's Office, Department of State. I appreciate the opportunity to present the Department's views on the foreign policy and international law aspects bearing upon the Committee's consideration of the reauthorization of the Endangered Species Act of 1973, and the proposed amendments contained in S.2309.

The Department of State is firmly committed to the reauthorization of the Act as a means of carrying out our international obligations and furthering U.S. interests, without amendments which would call into question our ability to carry out those obligations or which would detract from the leadership role we exercise.

The United States is a leader in international conservation efforts. We have a long history in this respect. One of the most important examples of our leadership is the Convention on International Trade in Endangered Species of Wild Fauna and Flora. This Convention, known as CITES, was a U.S. initiative. It was encouraged by Congress in the Endangered Species Act of 1969 and it was concluded at a Plenipotentiary Conference held in Washington in 1973. The United States became a party to CITES in 1975, and now 76 member states are bound by its obligations. The United States, through the Endangered Species Act, has responsibly implemented its requirements under CITES and we have encouraged others to do likewise.

It has been United States policy to encourage the widest possible membership in CITES and to make CITES as strong and effective as possible. To the extent there is an interest in the United States in preserving the earth's irreplaceable natural resources, we must be an effective advocate and we must legally ensure that we or others do not take actions to the detriment of that goal. CITES, and the Endangered Species Act which implements it, are of fundamental importance in this regard.

Talk about our leadership role is not mere rhetoric. It is important for us to retain leadership, in order to be able to guide conservation along practical, balanced, scientific lines which are acceptable to conservationist and commercial interests alike, and which recognize the divisions between federal, state and local responsibilities.

Turning to S.2309, the Department finds that many of the proposed amendments concern matters under the province of the Departments of Interior or Commerce, not bearing upon our foreign relations. There are, however, matters under consideration in Section 8 and Section 4 of S.2309 that we would like to comment on which do relate to the conduct of foreign relations and to our treaty obligations.

The first and most important is the proposed amendment at Section 8 of S.2309 to amend Section 8A(c) of the Act concerning the functions of the U.S. scientific authority in implementing CITES. We believe this proposal is consistent with our international obligations under CITES. It would retain the independent authority of the Secretary of the Interior, acting as the U.S. national scientific authority, to make "no detriment" determinations as required by CITES. However, the proposed amendment would make clear that the Secretary of Interior is not required to use or not use any specific method in arriving at such determinations. The no detriment standard, a legal standard under an international agreement, is best interpreted by the Parties to the Treaty, not by unilateral legislative determinations that do not take into account the international process. We believe the approach of S.2309 of giving the Secretary of the Interior some flexibility in making no detriment determinations, is consistent with the international process and our obligations under CITES.

In this regard, there are three technical points we would make concerning the proposed amendment at Section 8(2) of S.2309. First, the words "from the sea" should be added after "introduction" in the first sentence to be consistent with the wording of the Convention. Second, the proposal makes reference only to Article IV and Appendix II of the Convention. We question whether Article III and Appendix I of CITES should not also be included in this reference. Although trade in Appendix I species is regulated differently than that of Appendix II species (no commercial trade in the former), the Secretary of Interior, acting as our scientific authority, must make a finding of no detriment to survival of the species for exports and introduction from the sea of specimens on either appendix. The Secretary should be able to base such a determination on the appropriate criteria in either case. To include only Appendix II species in this section creates an implication that the standard is different for Appendix I species.

Third, the Department suggests that in the last two sentences of this section, the phrase "professionally accepted" be used in place of the word "reliable" relating to "wildlife management practices". This would make clear that the practices which the United States considers as an appropriate basis for no detriment findings are generally accepted by the wildlife management profession.

In Section 4 of S.2309, there are two matters on which we would like to comment. First, the Department strongly supports the proposed addition to Section 4 of provision (b)(5)(B) which: 1) provides for notification, in so far as practical, in cooperation with the Department of State, of regulations relating to listing of species of foreign nations: a) to those nations in which species are believed to occur or b) to those nations whose citizens harvest the species on the high seas, and 2) would invite comments from such nations. If this proposed provision is enacted, the Department will make every effort to cooperate in implementing it. On the other hand, as drafted, Section 4 would delete the requirement that the Secretary of Interior, in determining whether a foreign species or one found on the high seas is endangered or threatened, shall cooperate with the Secretary of State in consulting with and taking into account the efforts, if any, of a foreign country to protect that species. The Department considers that: 1) as relations with foreign nations fall within the province of the Department of State, and 2) as the Department is in a position through its diplomatic and consular missions abroad to expedite information collection on foreign efforts to protect species, the provision for cooperation with the Department of State should be retained in Section 4(b)(1).

Mr. Chairman, those are the Department's specific comments on S.2309. Since the Department did not have an opportunity to testify before you during your oversight hearings last December, there is a general matter that we would like to raise at this time. It has come to our attention that, while not contained in S.2309, certain interests are proposing that the Act be amended to require that the United States automatically take a reservation if, pursuant to CITES, a domestic species is added to Appendix I or Appendix II notwithstanding U.S. opposition. The effect of a reservation under CITES is that the reserving State is treated as a non-party to the Convention with respect to trade in the species concerned (Articles XXIII, XV, and XVI). The Department of State is not opposed to taking a reservation to CITES when there is a good reason for doing so, but this should be a matter of discretion exercised by the Executive. We believe that an amendment to the Act mandating the taking of a reservation as has been proposed by some, is inappropriate and inflexible and does not further our interests from a practical perspective.

Upon review, we have been unable to identify any other treaty to which the United States is a Party upon which there has been imposed a legislatively required reservation in specified instances. There are a number of good reasons for this. There is a constitutional issue, of course. It falls to the President under the Constitution to conduct the foreign affairs of our nation. Legislatively required reservations could be seen as an infringement on the President's treaty-making power. Setting aside a constitutional law debate, the general need for flexibility in the conduct of our foreign relations dictates against a legislated automatic reservation procedure. Generally, the United States would not take a reservation to an international agreement except in those cases where, absent a reservation, the treaty would conflict with U.S. law, be impossible to implement, or would do substantial harm to U.S. interests. In other words, the taking of a reservation to an international agreement should be treated seriously and should only be taken in extreme cases.

The U.S. in the past has discouraged others from taking reservations to CITES, and recently, we decided not to do so ourselves when the opportunity arose. Our policy has been dictated by a concern that in this 70-plus member Convention, the broad scale taking of reservations could soon become the death knell of this Convention's effectiveness. We believe that a U.S. policy of automatic reservations would have this effect, and are concerned with the precedent it would set. Mandatory reservations by other Parties to CITES could soon turn this very effective conservation convention into an ineffective international institution.

Moreover, a mandatory requirement to take reservations would be unduly inflexible. Each situation should be analyzed on a case-by-case basis because there are varying merits, foreign policy implications and factors that are in play in any given situation.

Mr. Chairman, I believe it is also important to note that mandatory reservations would not really accomplish a change in the requirements for trade in those species with CITES parties who have not taken a similar reservation. The only instances where a reservation would substantially change the requirements would be if there were multiple reservations to the listing of that species by CITES Parties, or if the U.S. trade was with countries not Parties to the Convention itself. Article X requires parties to CITES, before export, import or re-export, to obtain comparable documentation issued by competent authorities in non-party states. Thus, if the U.S. reserved to an Appendix I or II listing, but other parties did not, Article X of CITES would still require those other parties to obtain "comparable documentation" from the United States authorities, which substantially conforms with the requirements of the Convention. Therefore, in such a case a U.S. exporter, if exporting a domestic species to a CITES country, is not really in a different situation than had the U.S. not taken a reservation. Similarly, there is no real benefit to a U.S. importer of a CITES listed species from a CITES party in the case of a U.S. reservation. As regards Appendix II species, CITES documents would still have to be obtained in the country of export; and while those documents might not be required for import into the United States under the Endangered Species Act or CITES, the Lacey Act remains applicable. As regards the import of an Appendix I species by a U.S. importer, the CITES party exporting would still have to be satisfied that an import permit had been granted substantially conforming with CITES requirements, that is, including a no detriment finding and that the import was not to be used primarily for commercial purposes.

In essence, Mr. Chairman, the legal structure of CITES is such that the taking of a reservation (by the U.S. to a listing of a foreign or domestic species) is little more than a political objection, at least as concerns parties to the Convention. The Department is aware that there have been unjustified listings in the past, but we generally believe that there are better ways of dealing with the problem other than automatic reservations. I wish to emphasize that the Department of State is not opposed to reservations, per se, but before taking a reservation we should assess the full range of our interests and gauge our actions accordingly. We shall work diligently, in cooperation with the Department of Interior, in conveying our concerns.

In closing, Mr. Chairman, I would like to note the considerable international interest in our Endangered Species Act. The Act is a precedent that many other nations have since followed. On behalf of the Department of State, I respectfully urge that the Act be reauthorized as it has in the past in a manner which accords with our treaty obligations and supports our foreign policy interests. We believe that S.2309 does that. Thank you.

Statement of
INTERNATIONAL ASSOCIATION OF
FISH AND WILDLIFE AGENCIES

Before the
Subcommittee on Environmental Pollution
Senate Committee on Environment and Public Works
on

S. 2309, Endangered Species Act
Amendments of 1982

April 19, 1982

Mr. Chairman, I am William S. Huey, Secretary of the New Mexico Department of Natural Resources. I appreciate this opportunity to testify on behalf of the International Association of Fish and Wildlife Agencies, an association whose government members include the fish and wildlife agencies of all fifty states. My professional career began in 1948 as a District Wildlife Officer with the New Mexico Department of Game and Fish. I was serving as Director of that Department when appointed to my present position in 1977. My entire professional career has been devoted to protection and management of fish and wildlife.

Except for the particulars set forth in my statement, Mr. Chairman, we support S. 2309, and appreciate the willingness of your Subcommittee to address several of the problem areas we have identified.

Mr. Chairman, one truth learned during a career in wildlife management is that to be durable, wildlife conservation programs must be seen to possess integrity. Time and again, wildlife proposals not soundly based on scientific resource information have failed in the competition with other important public policy interests. The International

Association has advocated a soundly based endangered species program and, as professional wildlife managers, we have urged that the integrity of the program be maintained so that it may be durable over time. We have stated this in testimony in prior years and it remains our view today. There are three keys to a successful federal endangered species program: (1) maintenance of the integrity of the listing process; (2) development of close federal-state cooperation; and (3) statutory recognition of the importance of habitat protection. The Association's objective in 1982 is a reauthorized endangered species program which is durable and effective but, once again, Mr. Chairman, the three key elements need attention by Congress to achieve this goal.

1. Integrity of the Listing Process. The Association has been alarmed by the lack of integrity of decisions taken under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), implemented by Congress in the Endangered Species Act. We are equally alarmed at the acceptance of this condition and the apparent reluctance to do anything about it, as if CITES were some kind of sacred cow. I refer to the listing of species in the appendices to CITES.

The species listed in Appendices I and II were established by negotiation at the time that the rest of the CITES Convention was negotiated in 1973. Changes in either of these appendices may be made by agreement of the parties and CITES provides for a Conference of the Parties every two years. The listing of species in the CITES appendices triggers restrictive national mechanisms; listing of a species in Appendix II, for example, requires advice from a national authority (the Scientific Authority appointed by each signatory nation) that export of the particular species will not be detrimental to survival of that species. A nation that does not agree with a particular listing may issue a reservation and not be bound to follow CITES in respect of that particular species.

I have attended several CITES meetings, Mr. Chairman, in Geneva in 1977, in San Jose, Costa Rica in 1979, and the 1981 meeting in New Delhi. I can testify to you that these meetings are characterized by a profound absence of scientific rigor that does not bode well for the future of CITES. As a result of listing entire families and even orders to the appendices, numerous species have found their way into the lists which do not belong there. In the first conference of the Parties in Berne in 1976, the family Felidae, was added to Appendix II on the basis of no biological or trade information whatsoever. I repeat: the entire family Felidae, which includes a number of common species of cats, was added to Appendix II on the basis of no biological or trade information whatsoever.1/ As a consequence

---

1/ At the Berne meeting held on five days in November 1976, the United States proposed five changes to the appendices, all relating to marine mammals or fish. The U.K., Australia and Iran proposed 623 amendments. Among the U.K.'s 528 amendments was number 307, that the entire family Felidae be listed in Appendix II, if not already on Appendix I, except for the domestic cat.

of this wholesale listing, the bobcat and lynx were made part of Appendix II. And, while this listing was accomplished with little or no information, the Convention requires rigorous information to remove an improperly listed species. CITES inhales but apparently does not exhale.

Early in 1978 a Working Group of twelve U.S. experts on the biology and management of bobcat, lynx, and river otter (seven from the academic world, four from state conservation agencies, and Dr. L. David Mech of the U.S. Fish and Wildlife Service as chairman) was convened by the U.S. Scientific Authority to assist it in establishing criteria on which to base no-detriment findings. The report of the Working Group states:

> We Working Group members feel extremely uncomfortable about our charge. This discomfort arises from the feeling that the bobcat, lynx, and river otter had been placed on Appendix II for political rather than biological reasons. Furthermore, we are concerned that neither States nor recognized authorities on the status of the subject species were consulted before the inclusion of the species in Appendix II.

Despite its skepticism over the inclusion of bobcat, lynx and river otter in Appendix II, the Working Group recommended specific guidelines to the Scientific Authority regarding export findings. With respect to biological information, the Working Group declared that population trend information should be utilized, the method of determination to be a matter of state choice.

The Scientific Authority adopted the recommendations of the Working Group and acted thereon until last year when the mistake originally made in listing the bobcat was compounded by a ruling of the U.S. Court of Appeals for the District of Columbia Circuit. In the bobcat litigation, an environmental group went into court to set aside no-detriment findings, made on the basis of Working Group recommendations, by the federal Scientific Authority. In Defenders of Wildlife, Inc. v. Endangered Species Scientific Authority, No. 79-2512 (D.C. Cir., February 3, 1981), the court ruled that population estimates are necessary in making no-detriment findings under Article IV of CITES, and that population trend information is inadequate. That ruling is simply wrong and is judicial legislation at its worst because it was entered in the teeth of the recommendations of the Working Group experts. The Court's answer to the recommendations of the Working Group was to ignore them altogether.

Mr. Chairman, fish and wildlife managers have for years been investigating the matter of assessing abundance of resource stocks, but no single, unified approach exists. Nevertheless, a wide range of management decisions affecting fish and wildlife is made on the basis of population information derived from indirect methods. For example, the population size of most species of big game mammals cannot be established in terms of absolute numbers. Instead, the condition of a wildlife population is monitored by a variety of techniques including habitat surveys, indices of population size, sex and age ratios, and harvest data. As these data are accumulated over time, they reflect population trends, calling attention to changes in the population. The court's ruling that no-detriment findings must be based on population estimates is contrary to wildlife management as it is practiced in the United States and throughout the world.

Mr. Chairman, the bobcat litigation is a good example of the misuse of a well-intended, though we must say slackly drawn, conservation measure by anti-hunting, anti-trapping organizations such as Defenders of Wildlife. Loosely drafted legislative or treaty provisions provide the essential condition for litigation by such groups, affording the opportunity to persuade a court to enjoin legitimate activities of long-standing, activities which Congress would refuse to prohibit were the choice presented. In the course of the bobcat litigation, for example, the Defenders of Wildlife argued that the federal Scientific Authority could not lawfully accept as authentic, in making its no-detriment findings, the data generated by state wildlife agencies, the agencies having primary regulatory responsibility for managing bobcat. According to the Defenders, reliance by the federal Scientific Authority on state data to make no-detriment findings is unlawful because, Defenders say, "state agencies are not objective because they have a strong interest in obtaining export authorization." Consider the implications of that slur on state wildlife agencies, Mr. Chairman. It means that the Scientific Authority may not utilize data collected by state biologists but must independently collect its own data for a species if an export permit is sought. Did Congress really intend that the Scientific Authority employ hundreds of individuals to duplicate the job being performed by state personnel? Not likely.

Section 8 of the bill would amend section 8A of the Act to overrule the "bobcat" case. We have consulted with staff in connection with that particular provision and, except for our surprise at finding the word "reliable" at two places to modify "wildlife management practices," we believe the amendment is acceptable. Addition of the word "reliable" will simply lead to further, unnecessary litigation unless the Subcommittee intends to specify in its report which practices are "reliable" and which are not. Unless the Subcommittee so intends, the word "reliable" should be deleted. In order that the question of the Court's decision in combination with this legislation not further complicate the interpretation of bobcat population data, we would suggest to the Committee that language be added to make this section retroactive to findings made with respect to the 1981-82 harvest. Mr. Chairman, it is an enormous waste to spend time and money in litigation over matters like this when resources are stretched so thin and the needs in fish and wildlife management are so great. Along these same lines, Mr. Chairman, we would suggest that a five-year review is adequate biologically and much less expensive than the annual reviews now required.

Section 8(3) of the bill would abolish the International Convention Advisory Committee. We support abolition. ICAC constituted an additional bureaucratic laywer and was not particularly useful in implementing CITES.

We also urge Congress to insure against a repetition of the bobcat situation by amending the Act to direct that the United States take a reservation in situations where the Conference of the Parties undertakes improper listings of native species. We suggest to you that where a proposal is made by a third party signatory to list a species native to the United States, the Secretary of the Interior be directed to solicit public comment on the biological and trade status of the species, and make a determination whether the record supports the proposed listing. If the Secretary's determination is negative and the species is nevertheless listed by the Conference of the Parties over the opposition of the United States, the executive should be directed by Congress to take a reservation with respect to such species native to the United States. How can a third country declare that it has a better sense of the status of wildlife species native to the United States?

The extraordinarily lame position recently announced by the representative of the State Department, in hearings last month before the other body, that the integrity of the process is a secondary consideration and that the U.S. cannot take reservations in the face of improper listings else its position of conservation leadership be eroded, is extremely short-sighted, enhancing the reputation neither of State Department nor of CITES. What such a position accomplishes instead is to stiffen the resolve of responsible conservation organizations to examine, microscopically, every new State Department initiative in the conservation area to see whether integrity is being sacrificed to "leadership," be they migratory bird protocols or migratory species conventions.

With respect to domestic listing of species as endangered or threatened, S. 2309 introduces new evidentiary formulations which trigger or justify action by the Secretary. Thus, section 2(b)(3) of the bill relating to experimental populations provides for a determination of nonessentiality to the continued existence of an endangered or threatened species on the basis of "the best available biological information." Section 4(6) of the bill maintains the existing formulation of section 4(b) of the Act, directing the Secretary to make listing determinations on the basis of "the best scientific and commercial data available to him," while the new sections 4(b)(2) and 4(b)(3) trigger status reviews at the behest of professional scientific organizations, state wildlife agencies or other interested parties if their submissions present "substantial scientific information." This latter formulation would substitute for the previous "substantial evidence" and would appear to denote a higher quantum of evidence for proponents of change than heretofore existed. Finally, the new section 4 (b)(8) directs the Secretary to use "the best scientific data available" when he specifies critical habitat. There thus appear to be a multiplicity of evidentiary formulations and it occurs to us that some unification is in order. Whichever formulation is chosen, the key element is that the listing process be based on scientific information so as to maintain the integrity of the lists. It would also be desirable to elaborate the meaning of "professional scientific organizations, or subdivisions thereof." Section 4(6) of the bill, which would enact a new section 4(b) (2), requires the Secretary to institute a species review whenever any professional scientific organization, or subdivision thereof, state wildlife agency, or the wildlife agency of a foreign nation identifies a species as endangered or threatened. We nope that funding will remain for recovery efforts after satisfying what would appear to be an enormous administrative burden in section 4(b)(2).

2. Federal-State Cooperation. Mr. Chairman, section 2(a) (5) of the Act, section 6 of the Act, and the legislative

history of the Act make clear that successful development of an endangered species program in the United States depends upon close cooperation between federal and state agencies. Senate-House conferees in 1973 noted that the federal government was directing new, innovative, and expensive programs on the states and should therefore bear a significant portion of their costs. The conference report declared that "the grant authority must be exercised if the high purposes of this legislation are to be met." We cannot put it better than did Michael Bean of the Environmental Defense Fund who testified before this Subcommittee last December: "For the states to develop significant long-term conservation programs, they cannot be faced with a roller coaster of federal assistance." Mr. Chairman, the several states possess primary authority to manage and protect fish and resident wildlife, and state wildlife agencies employ literally thousands of individuals as biologists, law enforcement officers, and in administrative positions. Making use of state resources through section 6 of the Act is good sense, and we are grateful to this Committee for its efforts in attempting to restore funding for section 6 grants. We support the section 6 authorization level set forth in S. 2309.

The Association also supports section 3 of the bill which would change the federal-state cost sharing formula to 75/25. The existing cost sharing formula in the Act of two-thirds/one-third is less favorable to the states than cost sharing formulae established in the Federal Aid in Wildlife Restoration (Pittman-Robertson) Program and in the Federal Aid in Fish Restoration (Dingell-Johnson) Program. Section 3 would bring these several cost sharing ratios into alignment and do away with the distorting effects of differential ratios.

Experimental populations is another aspect of federal-state cooperation. The primary purpose of the Endangered Species Act is to prevent endangerment and extinction of animal and plant species, and return species so identified to the point where they are no longer endangered. In most cases we hope this will occur through provision of essential habitat and protective measures. In some cases, however, experimental populations can be established to facilitate the recovery process. Examples of the potential for experimental populations can be seen in the work on peregrine falcons and in the foster parent whooping crane program.

While desirable to promote the recovery of endangered species by introducing populations into new areas where habitat is suitable, such introductions have led to complications owing to the rigidities of the Act. Once a species of fish or wildlife is listed as endangered, the Act automatically prohibits a number of activities, including taking in all its forms, and modification of critical habitat. We in New Mexico have had significant problems with the introduction of the whooping crane. The State of New Mexico agreed to cooperate in this program and I expended considerable personal effort in the endeavor. Let me describe our experience.

The foster parent program involves placing whooping crane eggs in sandhill crane nests at Gray's Lake National Wildlife Refuge in Idaho. The young whoopers fly south with their foster parents and winter in New Mexico with the sandhills but begin to break with their foster parents when they return north as sub-adults. When the sub-adult whoopers again migrate south the following year they do not winter with their sandhill crane families. In fact, there have been 15-20 of the experimental whoopers spread around New Mexico the past three winters from Albuquerque to the Mexican border. Federal and state agents attempt to monitor the whereabouts of the whoopers and, at times, have gone to considerable lengths to prevent harassment of these birds. In the past few years there have been calls to close the Rio Grande Valley in New Mexico to waterfowl hunting because of the presence of the experimental whoopers. That may seem extreme to you but some take the view that the Act provides no alternative. Endangered fish stocks can also be introduced but what happens if an endangered species such as the Colorado River Squawfish is introduced into lower reaches of the Colorado? Must all fishing in the area cease in order to avoid an unintentional, incidental take? States are now reluctant to participate in the introduction of experimental populations if recreational opportunities or management options are going to be foreclosed.

Section 2 of S. 2309 addresses this situation and, with minor changes, would provide the flexibility needed to encourage states to participate in such efforts. In the definition of "experimental populations," section 2(1) of the bill, the new section 3(7)(B) would declare that an experimental population shall be treated as such on those occasions when it is wholly separate geographically from nonexperimental populations. We assume this means separate from nonexperimental populations which are endangered or threatened. More important, we believe the bill introduces complexity by establishing distinctions between national wildlife refuges and other federal land systems. We oppose such a distinction as unnecessary and undesirable. The important point is that the Secretary have discretion to proscribe actions and establish critical habitat as he deems necessary for the experimental population, and not be held to the rigid provisions of the Act relating to endangered species. This should be accomplished with an eye toward accommodating legitimate local interests and, to this end, the Secretary should be required to develop a cooperative agreement with the state wildlife agency for each experimental population, or language concerning definition and implementation should remain silent on the question of authorization.

3. Critical Habitat. Mr. Chairman, section 4(a) of the Act lists a number of factors as potential causes of endangerment. The first factor listed is the "destruction, modification, or curtailment of habitat or range." Habitat loss is far and away the primary cause of species endangerment in the United States, and we refer not only to the impact of large-scale federal construction projects but as well to the ravages of developments such as housing subdivisions, shopping centers, and highway interchanges. Let there be no mistake: The protections of section 9 of the Act which prohibit taking, possession, or selling of listed species are of little consequence for species survival if critical habitat features are not protected.

The amendments of S. 2309 relating to the crucial item of designation of critical habitat give concern because their purpose is unclear. In its existing form, section 4(a) declares that at the time the Secretary proposes by regulation to list a species as endangered or threatened, he shall also specify habitat then considered critical, to the maximum extent that this is prudent. The House Report accompanying the 1978 ESA amendments declared that the phrase "to the maximum extent prudent" was intended to give the Secretary discretion to decide not to designate critical habitat concurrently with the listing where it would not be in the best interests of the species to do so. By way of example, the House Report noted that designation of critical habitat for some endangered plants might encourage individuals to collect the plants to the species detriment. But, the Report noted, "It is only in rare circumstances where the specification of critical habitat concurrently with the listing would not be beneficial to the species."[2] Section 4(1)(C) of S. 2309 would delete the existing requirement and the substitute, found in section 4(5) of the bill, would provide what is presumably a different procedure. We frankly do not understand the reason for the amendment but if it is intended to do away with a need for specification of critical habitat at time of listing, we would, except for the type of situation mentioned in the 1978 House Report, be opposed to such a change as constituting serious erosion of a key element of the Act.

Under the category of miscellany, section 9 of the bill authorizes the Attorney General to go into court to enjoin "any person who is alleged to be in violation of the Act or a regulation issued thereunder." We assume that the Attorney General would not seek an injunction upon someone else's allegation and that the allegation referred to in section 9, therefore, is the Attorney General's own allegation, made on the basis of an investigation which he deems to be adequate.

---

[2] Report of the Committee on Merchant Marine and Fisheries to Accompany H.R. 14104, H.Rep. No. 95-1625, 17 (1978), reprinted at 7 U.S. Code, Cong. & Admin. News 9453, 95th Cong., 2d Sess. (1978).

Mr. Chairman, I appreciate the opportunity to present testimony on the important reauthorization on behalf of the International Association of Fish and Wildlife Agencies.

The Nature Conservancy

1800 North Kent Street, Arlington, Virginia 22209
(703) 841-5300

STATEMENT OF WILLIAM D. BLAIR, JR.
PRESIDENT, THE NATURE CONSERVANCY,
ON S. 2309, THE ENDANGERED SPECIES
ACT AMENDMENTS OF 1982, BEFORE THE
SENATE SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION
APRIL 19, 1982

I appreciate the opportunity to testify on S. 2309, the Endangered Species Act Amendments of 1982. The principal mission of The Nature Conservancy closely parallels the conservation goals of the Endangered Species Act. The Conservancy's two major objectives are to identify scientifically the best examples of America's ecosystem types and rare species' habitats and then take direct action to provide protection for the most threatened and unprotected areas and species, particularly those found on private land.

Working independently, and in cooperation with federal, state, and local conservation agencies, the Conservancy has helped conserve 1.8 million acres of natural land since 1954. Included in this acreage are the habitats of 36 animals and two plants listed as threatened or endangered on the federal list, and 70 plant species under review for potential federal listing. We have also protected numerous state-listed species in virtually every state. Approximately 60 percent of the lands we now acquire are owned and managed by the Conservancy; the remainder are transferred to public or private conservation agencies and organizations.

S. 2309 SUPPORTED

With regard to S. 2309, the Conservancy's principal expertise is in the area of scientific research and data management, functions covered by Sections 4 and 6 of the Act. Accordingly, my remarks will focus primarily on these provisions of the Act.

Before discussing some suggestions for improving S. 2309, I would like to state that, generally, the Conservancy supports those constructive actions taken in the bill to improve the Act where evidence shows improvement is clearly needed. Specifically, we agree with the intent of the legislation to:

(1) create a category of "experimental populations" to encourage reintroduction efforts for species within historic range;

(2) shorten the length of time required for the exemption process;

(3) exempt development actions permitted under Section 7 from Section 9 "taking" prohibitions where such exemption does not jeopardize the existence of a species, provided that reasonable measures are taken t6 avoid undue harm to those individuals of the species affected by the action;

(4) renew the Act for three years at an authorized funding level of $38.9 million annually.

I do have a few suggestions for the committee's considerations, however, which I think will improve the Act's efficiency and productivity.

SECTION 4 NOT WORKING

I think it is generally agreed that the great failure of the current program has been the subordination of the biological fact-finding process of Section 4 to overly complex administrative procedures and economic analyses that add nothing to the biological status-determinations that must be made.

S. 2309 makes commendable strides in reshaping the Section 4 status determination and listing process. Especially significant is the bill's requirement that the decision to list a species be affirmed or denied within two years and that clear reasons be given for the decision.

Heretofore, many species have languished in bureaucratic purgatory.

For example, there is only one known individual of the Pitkin marsh Indian paintbrush (Castilleja uliginosa), a wildflower located in California. In 1975, the Smithsonian petitioned to have this plant listed as endangered. Seven years later, it is still under review by the USFWS. There is little excuse for this kind of delay in determining whether or not to list a species.

TREATMENT OF LISTING REQUESTS BY SCIENTIFIC ORGANIZATIONS AND PETITIONERS

S. 2309 contains new provisions which require the Secretary to more closely review and evaluate biological information submitted by states, scientific organizations, or private petitioners. The use of competent parties outside the federal government to assist the Secretary is laudable, especially since the federal budget is being significantly reduced.

Regardless of whether a proposal for listing is submitted by a scientific organization, state government, foreign national or private petitioner, the Secretary must first determine that there is substantial scientific evidence to support that proposal. This requirement is of paramount importance, and we strongly support it. It allows the Secretary to separate sound proposals from frivolous ones by placing the justification for listing squarely where it belongs--on sound scientific evidence.

However, I see little reason why the Secretary needs up to 12 months of additional time to decide whether or not to propose a species for listing once he has agreed that there is credible scientific evidence. Common sense dictates that he propose the species for listing, then make a determination whether or not to actually list it after gathering public comments.

Timely consideration of species for which credible evidence has been submitted is clearly in accord with the goal of the endangered species program.

The number of credible "outside" proposals is not expected to be large. The Secretary still has the power to weed out unsubstantiated requests.

Nor does the requirement to send substantial scientific proposals directly to the listing phase conflict with Section 4 (h)(3) of the Act which says that the Secretary must establish:

> "a ranking system to assist in the identification of species that should receive priority review for listing."

This language refers to the status reviews conducted by the Department of the Interior under current law. Obviously the Secretary must have a system for determining which species he wishes to collect information on, but when presented with a clear case of endangerment, nothing in that language prevents him from immediately proposing a species for listing.

CRITICAL HABITAT DESIGNATION

Another major impediment to the listing of species has been the requirement that critical habitat be designated to the extent prudent at the time of listing. Whatever its original intent, this provision has added to the cumbersomeness of the Act and contributes to delays.

We simply do not have sufficient knowledge about many species to determine all of their critical habitat requirements without further research. Yet we know from other indicators, such as population estimates and sightings, that certain species are definitely rare and in danger of extinction.

For instance, the Eskimo curlew, once shot in immense numbers, is listed as endangered (an action that occurred before the 1978 amendments). It is occasionally reported in small numbers in migration. No breeding or wintering sites are presently known. Its potential breeding habitat covers vast areas of the arctic tundra.

Species like the curlew should be listed even though we don't know their critical habitat. Listing serves to focus attention on the need to develop a plan of action for conserving the species, including field research. Listing also provides the species with the protection of Sections 7 and 9. But there is no guarantee that species like the curlew will be listed under existing law. As currently written, the statute can be construed to deny listings to any species for which complete habitat information is not available.

S. 2309 has correctly eliminated this problem by stating that critical habitat only be designated to the "extent prudent and determinable" at the time listing occurs. The Conservancy strongly supports this change.

The new language enables the Secretary to base both his listing decisions and habitat designations on the best available, known information. By designating known habitats, development interests are properly notified of areas where their actions must be carefully undertaken so as to avoid harm to listed species.

CRITICAL HABITAT AND ECONOMICS

S. 2309 retains the provision of current law that requires the Secretary to consider the economic impacts of designating particular areas as critical habitat and gives the Secretary discretion to exclude areas from habitat designation if he believes the benefits of such exclusion outweigh the benefits of designation.

Economic factors should not distort the purely biological process of critical habitat designation. The Act already provides a consultation and exemption process in which the economic benefits of a specific action are balanced against the conservation needs of affected species. This is the proper place to consider economic factors, not in the habitat designation process. I recommend that economic considerations for critical habitat designations be dropped from the bill.

SECTION 6 GRANTS

For two years in a row, the Administration has recommended no funds for state grant assistance under Section 6.

While there may be other federal grant programs that should be funded only by the states themselves, Section 6 matching grants are clearly a device for helping the Department of the Interior accomplish our national endangered species goals more effectively by utilizing the talents of state natural resource agencies.

Section 6 grants are used to protect endangered species for the benefit of the entire nation. Funds are utilized to undertake biological surveys, recovery plans, and enforcement activities. I urge this committee to do what it can to encourage an appropriation of $3 million for state matching grants in FY 1983. It will be money well spent.

CONCLUSION

Like many federal programs, the Endangered Species budget is suffering from inadequate funds. Only $16.5 million has been proposed by the Reagan Administration for 1983--an amount roughly equal to the FY 1982 appropriation. This no growth budget will not help eliminate the backlog of 3,000 species that are candidates for listing.

Calls for more funds probably will not be heeded until the economy improves. To a certain extent, more efficient use of existing funds, along with appropriations for state grants under Section 6, will help keep the program operating at a minimum of effort.

But I think we must clearly recognize that the tasks of identifying and conserving our threatened wildlife and plants is greater and more complex than supposed when the 1973 Act was passed. Numerous requirements have been placed on the Department of the Interior to gather information, consult with other federal agencies on thousands of development projects, and police illegal trade in plants and wildlife. At some point we must face the fact that the endangered species budget must be substantially increased for the Act to function properly.

# # # # #

Natural Resources Defense Council, Inc.
1725 I STREET, N.W.
SUITE 600
WASHINGTON, D.C. 20006
202 223-8210

New York Office
122 EAST 42ND STREET
NEW YORK, N.Y. 10168
212 949-0049

Western Office
25 KEARNY STREET
SAN FRANCISCO, CALIF. 94108
415 421-6561

Comments of
the Natural Resources Defense Council
on Reauthorization of
the Endangered Species Act

April 19, 1982

New England Office: 17 ERIE DRIVE · NATICK, MA. 01760 · 617 655-2656
Public Lands Institute: 1720 RACE STREET · DENVER, CO. 80206 · 303 377-9740

Hello. I am Faith Thompson Campbell, representing the Natural Resources Defense Council, Inc., a public interest environmental organization of 45,000 members. I wish to thank the Committee for this opportunity to discuss the Endangered Species Act's protection for rare plants. NRDC, along with several other organizations, submitted a more general statement on plant conservation under the Act at the time of the December, 1981 hearing. Today I will focus on the problem of collecting of plants. Parenthetically, I will add that NRDC has joined in statements to be given by Michael Bean and Kenneth Berlin concerning specific provisions of S. 2309 as introduced.

The Act recognizes overcollecting as a significant cause of endangerment for some plants. It seeks to reduce this threat by prohibiting interstate and foreign commerce and exports and imports of listed plant species. Further, Federal land-owning agencies have an obligation under Section 7 to regulate the collection of listed plants from lands under their jurisdiction. Unfortunately, neither of these provisions has been implemented adequately.

Cactus collecting for commercial sale is considered to be continuing in Texas; the threatened Neolloydia mariposensis is reported by two sources as still being sold in variety boxes by gift shops along the highway. Some cactus nursery catalogs advertise listed species without indications that they are artificially propagated. NRDC requests the Committee to urge the U.S. Fish and Wildlife Service to investigate these apparent violations of the Act.

Nor do all Federal land-managing agencies comply with the obligation to regulate collecting. The Forest Service has a good policy which requires permits for collecting of listed and "sensitive" species; the latter are designated by the regional forester, but include candidate species, plants listed pursuant to State laws, and others determined by the forester. The Bureau of Land Management, on the contrary, has no policy. Bureau staff began drafting collecting regulations in 1980, but this effort has now been shelved. BLM's position is most alarming because it has jurisdiction over the locations of many of the most sought-after plant species. NRDC has proposed an amendment that addresses this issue, but at a minimum, the Committee should instruct BLM to promulgate collecting regulations promptly.

Unfortunately, correction of these failures of implementation will not eliminate the threat to rare plants posed by collecting. Available information, which I will discuss in more detail below, indicates that "hobby" collecting by individual plant fanciers and botanists who trade among themselves can be a serious cause of depletion. Therefore, we ask the Committee to adopt amendments that would prohibit collecting of listed plant species for the purpose of possessing them and require Federal land-managing agencies to regulate the collecting of plant species for which there is a large demand that threatens to cause their depletion. These amendments are logical extensions of the Act for they would help curb a recognized cause of endangerment and perhaps reduce the number of species that require listing under the Act.

At present, the endangered and threatened species lists contain 61 species of plants found in the United States. Another 3,000 species are considered eligible for listing (candidates) because of depleted populations. A surprising number of these very rare plants are sought by collectors. According to experts on the trade, collectors who seek the extremely rare species tend to be sophisticated specialists with a strong desire to obtain their specimens. They often dig the plants themselves, or trade "surplus" specimens with friends. Thus, the trade is not commercial and does not come under the control of the Act as now written. This "hobby" trade can be quite damaging, however.

It is impossible to document the actual extent of this hobby trade because there are no data on the number of people involved, the size of their collections, etc. Indeed, there is no source of data on the domestic commercial trade in particular species of plants. Data do exist on the international trade, but they must be regarded as incomplete. For example, the U.S. Annual Report under the CITES for 1979 includes only 16% of the estimated total cactus exports for that year. (See Linda McMahan, U.S. Exports and Imports of Cacti, 1977-1979, Report by the International Convention Advisory Commission, August 1981; and Thomas Gibson, et al., International Trade in Plants: Focus on U.S. Exports and Imports, TRAFFIC (USA), Special Report #4, 1982). In addition, some of the hobby trade may be concealed because it is considered unethical, if not in violation of the Endangered Species Act, various State laws, or National Park Service or other collecting regulations. Finally, determination of the volume of collecting of plant species that have been listed under the Act is hampered by the short time that has passed since the listings occurred (28 months in the case of cacti, for example).

The trade is potentially large, however. Thousands of Americans are fanciers of plant groups that include endangered and threatened species. Thus, the American Orchid Society has 20,000 members, the Cactus and Succulent Society has 7,000 and the 10-year old Carnivorous Plant Society has over 1,000. Of course, most members of these societies collect and trade in more common species, and in propagated plants. But some proportion of them seeks the extremely rare.

Although we cannot specify the size of the trade in endangered plant species, we can document that it exists. Some botanists have observed the disappearance of plants from sites they are studying. Field-collected specimens may be seen in various collections, although the date of collection may be difficult to determine. Conservationists who attend plant society conventions or correspond with plant fanciers learn that colleagues have obtained a particular species. Cactus species now listed under the Act or candidates for listing are named in trade reports such as those required by CITES. Finally, listed and candidate species appear in dealers' catalogs and advertisements.

Botanists are able to document continued collection of some listed species. During the past year, 8 or 9 clumps of the endangered Green Pitcher Plant have been taken from one bog near Center, Alabama. In fact, this is the bog illustrated in this photograph. One of the experts on the species receives frequent letters and telephone calls requesting information on the species' location; he does not supply this information. Another botanist can name 7 people who have collected the species since the mid-1970s, only one of whom is a commercial dealer. He estimates that as many as 20 people may have collected the species and that probably 50 people now have specimens.

A botanist living in the West reports that several of the _Pediocactus_ species that are listed as endangered or threatened are still being collected. He is particularly concerned about _Pediocactus knowltonii_, which is found in New Mexico and Colorado. He considers collecting to be an even bigger problem in Texas.

Other listed plant species are known to be in various collections, but the date of their removal from the wild is not certain. One of these is _Trillium persistens_, illustrated here, an endangered trillium found in Georgia and South Carolina; it is known to be in two private collections and one botanical garden. _Echinocactus horizonthalonius_ var. _nicholii_, an endangered cactus illustrated in this photograph, is found in at least six collections in Arizona alone.

Many listed plant species were known to be subject to collecting at the time of their listing, but the record is not clear as to whether collecting continues. Included are virtually all of the 21 cactus species, with the exception of those mentioned above as still suffering depredations. The Federal Register notices finalizing listing mention collecting as a threat. Attached to this testimony are two tables taken from the recent TRAFFIC report on the plant trade (Gibson, *et al.*, *op. cit.*) The first lists 9 listed cactus species that were recorded as exports during 1977-1979. Given the severe deficiencies of the CITES data from which this table was derived, both the number of plants and the number of species there reported must be regarded as underestimates. Domestic trade in these species would be greater yet.

The second table records the result of a survey of cactus nursery catalogs issued in 1978 and 1979. Ten of the nineteen nurseries sold species that were listed as endangered or threatened in November 1979. Four of these nurseries were of the type that sell large numbers [illegible] a few species; these four also collected 50% or more of the species they sold. Clearly, at the time of listing, trade in these rare cacti was probably considerable. Some of this trade continues; we just do not know how much.

Another, extremely rare, plant also suffered from collecting just prior to its listing under the Act. The Virginia round-leaf birch, *Betula uber*, had a total population of 15 adults and 21 seedlings at the time of its rediscovery in 1975. By the time it was listed, 12 of those seedlings had been taken, either for scientific purposes or by unknown people. (The species' survival was further jeopardized by vandals, who damaged 7 of the remaining seedlings; and by the death as a result of natural causes of 3 of the adults.)

It defies common sense to allow continued collecting of these listed species, collecting that depletes the species and undermines the other protective provisions of the Act. Protection of the habitats of these species requires sacrifices by land-managing agencies and various economic interests — sacrifices that NRDC considers reasonable and justified. It is only logical to ask plant fanciers and botanists to accept the lesser sacrifice of not collecting these plants. Therefore, NRDC urges the Committee to adopt the attached amendment to prohibit collecting of listed plant species except as authorized by a permit issued by the Secretary.

Many of the candidate plant species are as close to the brink of extinction as listed species; continued collection may force them over. Other types of plants are so heavily sought by collectors that failure to regulate the trade may later necessitate their listing under the Act. This is particularly well documented for the cacti. The U.S. has between 270 and

300 native cactus species. Seventy-two of these have been recorded as exports in incomplete CITES rports. The domestic and foreign trade certainly includes more. Over 80 species are considered in danger of extinction - either already listed as endangered or threatened, or candidates for listing. Cactus authority Dr. Lyman Benson considers overcollecting to be the most imminent threat to many cactus species. While the threat posed by the trade to other types of plants is less well known, we have already cited examples of candidate species that are collected.

Many of these candidate and other heavily traded species are collected from Federal lands. As many as 600 "haulers" dig cacti in Arizona, 44% of which is Federal land. In the mid-1970s, at least, cactus collecting was also widespread on BLM lands in southern California. The volume of collecting in Nevada, Utah, southwestern Colorado, and New Mexico (88%, 64%, 37%, and 33% Federal land) is probably less, but focuses on the Pediocactus and other rare genera in the United States. Forest Service lands in the Northwest harbor such sought-after candidates as various Lewisia species and the California pitcher plant, Darlingtonia californica.

Of these states, only Arizona, California, Nevada, and New Mexico regulate the harvest of cacti and other desert plants. Moreover, their permit issuance criteria are not based primarily on the biological status of the species. Arizona has the most aggressive enforcement program.

An amendment to regulate collecting of candidate and other heavily sought species from Federal lands would promote the goals of the Endangered Species Act and perhaps obviate the later need to list some of the species pursuant to it. In determining which species to protect by this amendment, the Committee should follow the precedent of the Lacey Act, and include those species protected by the CITES. This approach would assure inclusion of the most heavily traded species.

Thank you for this opportunity to address the Committee. I would be happy to answer any questions you may have.

Proposed Amendments to the Endangered Species Act

Section 9 Prohibited Acts

insert a new subparagraph, 9(a)(2)(B):

"remove any such species from the wild;"

and renumber subparagraphs (B), (C), and (D) accordingly;

insert a new paragraph, 9(a)(3):

"With respect to any species of plants listed on the Appendices of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, but not listed pursuant to Section 4 of this Act, it is unlawful for any person subject to the jurisdiction of the United States to remove such species from lands under the jurisdiction of the United States without a permit from the Federal agency having jurisdiction over such lands."

Section 10 Exceptions

change paragraph 10(a) to paragraph 10(a)(1) and add the following new paragraph 10(a)(2):

"The head of an agency with jurisdiction over lands on which occur species of plants listed under the Appendices of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, but not listed pursuant to Section 4 of this Act, may permit removal of such species from the wild, provided that he has determined that such removal will not be detrimental to the survival of the species nor reduce it below a level consistent with its role in the ecosystem."

Table 28

Exports and Imports of Cactus Species listed or under Review for Listing under the U.S. Endangered Species Act.

Scientific and Common Name	1977 Commercial Exports	1978 Commercial Exports	1979 Commercial Exports	1979 Commercial Imports	Totals
Endangered Plant Species					
Ancistrocactus tobuschii (bendera county c.)	--	--	4	--	4
Pediocactus bradyi (marble canyon cactus)	2	2	58	--	62
Pediocactus knowltonii (knowlton hedgehog c.)	3	--	--	--	3
Pediocactus sileri (gypsum cactus)	2	--	--	--	2
Sclerocactus wrightiae (wright fishhook c.)	1	--	--	--	1
	8	2	62	0	72
Threatened Plant Species					
Coryphantha sneedii v. leei (lee pincushion c.)	--	6	--	--	6
Neolloyida mariposensis (mariposa cactus)	1	-	25	--	26
Sclerocactus glaucus	3	--	--	--	3
Sclerocactus mesae-verdae (mesae-verdae c.)	4	--	--	--	4
	8	6	25	0	39
Plant Species Under Review					
Cereus greggii (queen of the night)	--	--	3	--	3
Cereus portoricensis (higo chumbo)	--	--	11	--	11
Epithelantha bokei	--	2	3	--	5
Ferocactus eastwoodiae (yellow-spined barrel)	--	--	1	--	1
Mammillaria thornberi	5	--	3	--	8
Neolloydia warnockii	1	--	--	--	1
Pediocactus papyracanthus (paper spine pee wee)	--	--	4	--	4
Pediocactus paradinei (houserock cactus)	2	--	--	--	2
Pediocactus peeblesianus v. fickeiseniae	3	--	--	--	3
Rhipsalis baccifera (mistletoe cactus)	--	--	2	8	10
Sclerocactus polyancistrus (pineapple cactus)	4	--	--	--	4
	15	8	28	8	59
TOTAL-ALL PLANTS IN THIS TABLE	31	16	115	8	170

Source: U.S. CITES data as analyzed in McMahan, 1981.

Table 33
Number of Species Offered in Cactus and Succulent Nursery Catalogues, 1978-1979.

Nursery Number	Number of Species Listed	Number of Species Judged to be Field Collected	Number of Species on the U.S. Endangered Species List
1	218	3	0
2	23	16	0
3	53	53	0
4	80	56	4
5	76	34	1
6	28	28	2
7	82	32	0
8	19	18	0
9	446	199	8
10	634	307	11
11	475	186	7
12	90	47	3
13	400	73	0
14	72	15	1
15	43	4	0
16	185	37	4
17	185	37	4
18	34	2	0
19	360	72	4

Source: Count and analysis of 19 different nursery catalogues by Niall McCarten.

Testimony on Reauthorization
# of the Endangered Species Act

Before
U.S. Senate Committee on Environment and Public Works
Subcommittee on Environmental Pollution

By
John W. Grandy, Ph.D.
Vice President/Wildlife
and Environment
The Humane Society of the United States

April 19, 1982

On behalf of

The Humane Society of the U.S.
Defenders of Wildlife
National Parks and Conservation Association

Mr. Chairman, my name is Dr. John W. Grandy. I am Vice President for Wildlife and Environment at The Humane Society of the United States, and am President of Monitor, Inc., the consortium of Animal Welfare, Environmental, and Conservation groups. I appreciate the invitation to testify in these hearings.

I hold a Ph.D. degree in wildlife ecology and management from the University of Massachusetts. In the past, I have held positions with the U.S. Fish and Wildlife Service, U.S. Forest Service, Virginia Commission of Game and Inland Fisheries, and the National Parks and Conservation Association. In 1972 and 1973, during my employment with the National Parks and Conservation Association, I was intimately involved in formulating and negotiating the treaty now known as the Convention of International Trade in Endangered Species of Wild Fauna and Flora (hereinafter CITES.) In addition, I worked with CITES and the Endangered Species Act when I was employed by the President's Council on Environmental Quality in 1974 and 1975. In 1977, I was a member of the U.S. Delegation to the Special Working Group meeting of CITES Parties held in Geneva, Switzerland. Subsequently, as Executive Vice President of Defenders of Wildlife (from 1975 to 1981), I formulated and guided the bobcat litigation under CITES, the results of which provide much of the subject matter being discussed at these hearings. I have been asked to present this statement today on behalf of, interalia, Defenders of Wildlife, since I headed Defenders at the time the suit was begun, since I have substantial expertise with respect to the issue, and since the suit is, after all, an action brought solely by Defenders of Wildlife.

I appreciate the opportunity to testify today on behalf of the 260,000 members and constituents of The Humane Society of the United States, Defenders of Wildlife, and the National Parks and Conservation Association. At the outset, we wish to stress that these organizations strongly support the Endangered Species Act of 1973 and reauthorization of the Act without weakening amendment. Our view on issues other than the Bobcat issue will presumably be addressed in the testimony of M. Bean and K. Berlin before this Subcommittee on April 22, 1982, on behalf of many conservation organizations including Defenders of Wildlife, The Humane Society of the United States, and the National Parks and Conservation Association. Consequently, we will limit our remarks herein to the Bobcat issue and related issues. In addition, we attach for the record a letter from our counsel, Covington and Burling, providing its legal opinion of any attempt to modify CITES or the Court of Appeals decision through amendment of the Endangered Species Act.

Initially, we regret the image which the numerous witnesses opposing bobcat protection and CITES tend to present. Indeed, with the volume of testimony being delivered in opposition to CITES protection for the Bobcat, one might think this protection a travesty.

Nothing could be further from the truth. Bobcat protection, as our remarks will demonstrate, is appropriate and mandated. The opposition to this protection is generated by a combination of the economics of fur, trapping, and fish and game agency funding, which is served by continued overexploitation of the bobcat, rather than U.S. compliance with its international commitments. For these reasons, and others which follow, we are deeply distressed by, and strongly oppose, the portion of the proposed amendments which override the legally mandated interpretation of CITES offered by you and Senator Mitchell and would likely remove important CITES protection for the bobcat.

I. Background

In order to control international trade threatening wildlife and plant species, the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) was negotiated in Washington, D.C., in 1973. 1/ At that time, the world's most exploited cat species were listed in the

---

1/ Largely drafted by the U.S., the CITES Treaty is frequently referred to as the "Washington Convention." Now 73 nations are members to this landmark agreement.

Treaty's appendices. Among those were the jaguar, margay, ocelot, leopard, and cheetah. Left unprotected were the American Bobcat and Canadian Lynx, among others.

As CITES came into force and the protection for the cats first listed began to work, the pressure of the spotted cat trade shifted to the cat species which did not have CITES protection. Suddenly, the bobcat, lynx, and other unprotected cats began showing up in large quantities in fur markets and fur salons in Europe. The United Kingdom, a major importer, could readily see the shift in exploited cats. As a result, the United Kingdom proposed at the first meeting of CITES Parties (held in 1976) that all cats which were then unprotected should be protected by CITES Appendix II. 1/ The logic was clear, concise, and cogent:

> All cats are potentially involved in the fur trade and the scale of this trade is such that all species must be considered as vulnerable, few populations now remaining unaffected...

The U.K. proposal was accepted by the required two-thirds majority and the cats were listed. 2/

1/ In order to be listed in Appendix II, animals must either be threatened with extinction, or likely to become so, if trade is not controlled. Clearly, the massive increase in trade in the once unprotected Bobcat, shows the wisdom and appropriateness of this listing.

2/ The U.S. Government, whose delegation included the Executive Vice President of International Association of Fish and Wildlife Agencies, endorsed and supported the U.K. proposal.

The CITES listing which became effective in February 1977, was particularly timely for the American Bobcat. The Bobcat's spotted fur, once dismissed by furriers as "inferior," was being avidly sought to replace the fur of endangered cats no longer legally available to the trade. Pelt prices were literally skyrocketing (e.g., Montana: $20 in 1968 vs. $200 in 1976) and the available information showed that populations were declining. Unfortunately, state fish and game agencies were caught largely unaware by the foreign demand for bobcats. Many state agencies had no management programs or legal authority over the bobcat, while others considered the Bobcat a varmint that could be killed at will.

In Janaury 1977, Defenders of Wildlife petitioned the Department of Interior to list the Bobcat under the Endangered Species Act (ESA). In July 1977, Interior published notice of its determination that Defenders had presented "substantial evidence," and that a review of the species' status would be undertaken.

The 1977-78 season was the first for which the U.S. was obligated by CITES to determine that the export of Bobcat pelts would "not be detrimental to the survival of the species." The U.S. Scientific Authority, designated under CITES to make "no detriment" findings, proposed that no Bobcat exports be allowed since what little information was available showed the species' status to be poor.

In response to Defenders' petition under ESA and the Scientific Authority action under CITES, fur and trapping interests generated thousands of letters to Capitol Hill and the Interior Department to pressure the responsible government agencies. Indeed one trapping publication awarded to the head of the Scientific Authority the "Skunk of the Year" award. State fish and game agencies, the funding for which comes largely from fees for licenses sold to hunters and trappers, and their representative, the International Association of Fish and Wildlife Agencies (IAFWA), protested vigorously as well. Their protests, however, carefully avoided the obvious economic nexus and obscured the issue of necessary protection for bobcats with cries of "states' rights."

Totally ignored was the fact that bobcat populations were extirpated or in jeopardy over much of the U.S. not because of Federal intervention but rather precisely because management programs were generally non-existent or grossly inadequate. 1/ Also ignored in the protests were the international obligations of the United States to enforce CITES both nationally and internationally.

1/ The State Fish and Game Agencies' position thus became, and indeed remains today, analagous to that of the man trying to shoot a messenger because the messenger is carrying "bad news."

International obligations notwithstanding, both the Scientific Authority and Interior capitulated under the pressure. The Scientific Authority dropped the export ban for the 1977-78 season in favor of state-by-state export quotas which were never enforced anyway. In subsequent years, the Scientific Authority dropped even the quotas and simply approved unlimited export. Interior never conducted the status review of the Bobcat under ESA, which Interior itself had previously determined was in fact warranted.

As a consequence of the Government's failure to comply with CITES or to provide protection for the Bobcat under ESA, Defenders of Wildlife brought a lawsuit under CITES. That suit, which was finally decided by the U.S. Supreme Court's refusal to review the February 3, 1981, Court of Appeals decision provides the crux of current debate.

Numerous arguments have been leveled at the Court decision, at bobcat protection under CITES, and indeed at CITES itself. All of these, you either have heard or will hear in some detail today. However, lost in all of the rhetoric are the reasons why bobcat protection under CITES is appropriate and necessary for the bobcat and critical to this nation and the CITES treaty. My discussion of these reasons follows. Lastly, I will address the continuing concern that has been raised that bobcat protection under the legal standards applicable to CITES is simply too expensive.

II. The Court of Appeals Decision is Consistent with CITES, and with Modern Day Wildlife Management and Should not be Changed by Congress.

The Court of Appeals invalidated the Government's standards for approving export and, affirmed CITES' clear intent that the benefit of any doubt concerning the effects of trade must be given to species' protection and not to continued exploitation. The Court also established two primary information requirements before Bobcat exports could be allowed from any state. First, the court decision required a reasonably reliable estimate of the size of the population which would be subjected to killing. Second, the Court required some limitation on the number to be killed. 1/

a. Court of Appeals Decision is Consistent with CITES

The Court's ruling with regard to population estimates is compelled by the language and standards of the CITES Treaty itself. Concerning the exports of Appendix II species, such as the Bobcat, CITES Article IV states:

> 2. (a) A Scientific Authority of the State of export has advised that such export will not be detrimental to the survival of that species;
>
> 2. ...the export of specimens of any such species should be limited in order to maintain that species throughout its range at a level consistent with its role in the ecosystem in which it occurs and well above the level at which that species might become eligible for inclusion in Appendix I. (Emphasis supplied.)

1/ This aspect of the decision is not discussed herein since no one seems to suggest that it is an inappropriate criterion. Notwithstanding that, many states still do not limit kill in any effective way.

The emphasis on population level reflected in this Treaty language clearly implies the need for quantitative analysis of existing bobcat populations--beyond gross assessment of change as reflected by population "trend" information--to determine the appropriate level of export.

b. The Court of Appeals Decision is Consistent with Modern Day Wildlife Management.

Fur and trapping interests and the IAFWA are claiming that reliable population estimates cannot be obtained and that this court-established requirement threatens wildlife management in this country. Under scrutiny these arguments can be seen for what they are--scare tactics--motivated by a desire to circumvent the requirements of CITES in order to kill and export unlimited numbers of Bobcats.

It is also important to understand what the Court of Appeals said about population estimates. The Court specifically rejected as unrealistic, head counts of animals, but rather required reasonably reliable estimates of population numbers. Further, the Court did not specify which of the many available techniques for estimating populations should be used or what factors should be considered in establishing reliability. Instead, the Court recognized the discretion of the responsible government agency in this area. For its part, Defenders of Wildlife attempted to assist the Government in complying with the appeals court decision by suggesting guidelines for evaluating the reliability of population estimates. 1/

The District Court-ordered export injunction which was handed down in April 1981 made it abundantly clear that the Government must comply with the appeals court ruling for export to be allowed for the current season. Nevertheless, the Government failed to make a good-faith effort to do so, 2/ until a further court order forced proposed guidelines in April 1982.

Rather, up until and even now, the Government, the fur industry, trappers, hunters and the IAFWA have all proceeded to protest that determining reliable minimum population estimates is impossible, and that they must have "legislative relief." The illogic of this position for federal and state fish and wildlife agencies is readily apparent from the fact that the Wildlife Management Techniques Manual (1969 and 1980 editions) contains chapters devoted to standardized techniques of

---

1/ For example, Defenders specifically recommended to the Government that "reliable" population estimates did not have to be a "statistically reliable" population estimate; other methods, such as substantiation of an estimate derived by one technique by use of a second independent technique could be satisfactory.

2/ The lack of government guidelines or standards for reliably estimating bobcat populations hampered many fish and game agencies attempting to develop reliable estimates and secure export approvals for the 1981-82 season. Some state agencies attempted to develop population estimates for the Bobcat and submit them to the government as early as 1977. (See 43 F.R. 11088; March 16, 1978). Other states lacking reliable estimates of Bobcat numbers have voluntarily closed off harvesting seasons. The state of Connecticut, for example, closed its Bobcat season in 1974 in order to protect the Bobcat until sufficient data could be collected to estimate the population size.

estimating population size. Moreover, the Manual even asserts, "The methods of estimating numbers of animals have now achieved a level of sophistication worthy of a mature science." 1/ The illogic is further apparent from the fact that these same government agencies last year strongly supported legislation (The Fish and Wildlife Conservation Act of 1980, P.L. 96-366) which requires determination of the population size of non-game species.

Indeed, in hearings on the Fish and Wildlife Conservation Act of 1980, held before this subcommittee, The International Association of Fish and Wildlife Agencies' representative expressed the unanimous support of all State Fish and Wildlife for the proposed law and its provisions. You, Mr. Chairman, even questioned a state agency witness on the desirability of requirements which included, interalia, population estimates. The response which you received, was without exception positive.

Based on similar testimony in the House of Representatives, the House Report of the Fish and Wildlife Conservation Act of 1980 concluded that the Bobcat in some states, such as your home state of Rhode Island, Mr. Chairman, is a non-game species, and in such cases would be the subject of a non-game plan, which would itself require a population estimate.

In my view, Mr. Chairman, it destroys the credibility of the International Association of Fish and Wildlife Association,

---

1/ Wildlife Management Techniques Manual. 1980, 4th edition. The Wildlife Society: Washington, D.C., p. 221.

fur and trapping interests, and others when they now ask us to believe that they are prepared to do a population estimate if the bobcat is a non-game species, but if the bobcat is a game species subject to mass exploitation, a population estimate is unnecessary.

Clearly, the inescapable conclusion is that the current opposition to determining minimum population levels of Bobcats reflects nothing more than a conscientious effort to avoid U.S. Treaty requirements. And while one may have trouble comprehending the rationale of the IAFWA for undermining species' protection and the CITES Treaty, it is not at all difficult to understand why the fur and trapping interests are attempting to do so.

Finally, the court-established requirement for population estimates is being portrayed by the special interests which seek to prevent proper implementation of CITES for the bobcat as a standard that will be used to challenge harvesting of other species under a myriad of domestic laws. This argument is also spurious. CITES is an international treaty with its own particular requirements and legislative history. CITES requirements only apply to animals and plants protected under CITES by inclusion in its appendices. Moreover, the judicial requirements for Bobcat export are based squarely on the particular CITES language.

III. Any amendment to the Endangered Species Act that alters U.S. obligations under CITES would harm wildlife and this nation's international reputation.

Amendment of the Endangered Species Act to undermine CITES would have serious negative ramifications. First, such an amendment would mean the significant loss of legitimate protection from harmful levels of international trade for the American Bobcat and other domestic species now listed on CITES Appendix II (Lynx and River Otter) and those listed in the future.

Second, such amendment is likely to set a dangerous precedent; namely, that impartial judicial interpretation of U.S. obligations under international agreements can be negated by special interest groups through domestic legislation secured by applying political pressure. If the U.S. desires to alter the standards of the CITES Treaty for wildlife protection, it should do so through the proper forum, the regular meetings of the 73 nation-members to CITES.

Third, unilateral weakening of the Treaty's protective standards by the U.S. over a controversial domestic species would seriously undermine the CITES Treaty and U.S. credibility. The U.S. has pushed strongly to bring about the protection of non-native species such as the endangered cats (cheetah, leopard, ocelot and jaguar) in their countries of origin and through control of international trade. Failure to comply in good faith with CITES for the domestic Bobcat will certainly be perceived as a double-standard for wildlife protection. Such action on the part of this nation, a primary drafter and negotiator of the "Washington Convention" and until recently a strong proponent of species' protection, will undoubtedly undermine the Treaty's success in controlling international trade in listed species.

Finally, U.S. renunciation of necessary protection for bobcats undoubtedly will encourage other nations to disregard CITES protective provisions with respect to other listed species. After all, if the nation which proposed CITES can ignore the Treaty's protective provisions for internal political reasons, then other nations which look to the U.S. for guidance can certainly be expected to take the same attitude.

IV. Bobcat Protection under CITES is Necessary and Appropriate.

We have discussed, (supra at pages four and five) the sequence of events which led the United Kingdom to propose the listing of all Felidae at the 1976 Conference of the Parties in Berne, Switzerland. In short, the listing was a result of excessive spotted cat trade which shifted to unprotected species as a result of the protection provided in 1973 to the world's most endangered spotted cats. Clearly, the massive, uncontrolled, and unlimited destruction of bobcats which was occurring at that time, and which was acknowledged by both the Fish and Wildlife Service (FWS) and Endangered Species Scientific Authority, showed the wisdom and appropriateness of providing Appendix II protection for the bobcat.

In that regard, it is important to recall that CITES mandates protection for animals on Appendix II essentially if they are threatened or likely to become so if trade is not controlled. That is precisely the situation which applied and still applies, to bobcats. Now, however, FWS and others would have us believe that the bobcat listing, if ever appropriate, is now inappropriate, presumably because the management programs of the states are sufficient to protect the bobcat.

The exhaustive record from the litigation makes clear--and the Court of Appeals essentially agreed--that information available from state management programs (on the basis of which the federal government was generally approving unlimited export and unlimited kill) is generally inadequate to insure compliance with CITES. Even now, some states allow unlimited killing of bobcats throughout the year. Furthermore, the FWS--on its own--

prohibited export this year from one state and limited export from four others in order to comply with even its own permissive interpretation of CITES.

Despite the Court ruling, the facts surrounding various state management programs and its own export restrictions, the FWS has now subsequently announced that state management programs are adequate to protect the bobcat and the bobcat no longer requires CITES protection. The logic of this position is fleeting, at best. At worst, there is no logic at all. Indeed, given this sequence of events, the only conclusion seems to be that the current FWS position is based upon political pressure, not upon the perceived adequacy or inadequacy of state programs.

Notwithstanding the above, however, one important point does emanate from the current FWS efforts to remove protection for the bobcat. That point is that if the FWS wants to remove the bobcat from protection under the treaty or even weaken the CITES treaty, the appropriate mechanism for such actions is that provided specifically by CITES: official proposals to the 73 CITES member nations.[1] By contrast, it is entirely inappropriate for furriers, trappers, and others to now run to the U.S. Congress in the hope that the Congress will unilaterally provide a way of weakening CITES implementation standards for this country.

---

[1] Indeed, the FWS has now initiated a postal vote procedure in an attempt to have the 73 nations agree that the bobcat should not be listed on Appendix II.

V. The expense of bobcat protection under CITES is a necessary part of our international obligations to conserve wildlife, resulting directly from the massive exploitation of the bobcat by the fur industry; such necessary expense provides no rationale for unilateral weakening of CITES, but rather clear rationale for reducing kill and improving state management so that the bobcat may be appropriately delisted.

Finally, Mr. Chairman, I want to address the nagging issue that CITES compliance and bobcat protection under legally mandated standards are using financial resources, which might better be used elsewhere.

Initially, it is important to reiterate that CITES is a treaty that in large measure was conceived of, and developed by the United States. It has been ratified by the Senate, and accepted as a legitimate and appropriate portion of the international obligations of this country. To the extent that these international obligations impose some expense to this country and its citizens, that is simply a legitimate cost of obligations which this country believes are important.

This situation is no different with respect to CITES than it is with respect to literally hundreds of other international treaties, which have been negotiated by the executive, ratified by the Senate, and adopted by this nation as "the law of the land." All, in all likelihood, cost this nation and its taxpaying citizens something by virtue of this nation's good faith compliance with the terms of the treaties. However, the existence of such costs emphatically provides no justification for having our Congress unilaterally undermine a treaty's implementation standards in this country.

The fact that the cost of complying with CITES requirements with respect to the bobcat listing is costing State Fish and Game Agencies funds is not surprising, particularly in light of the demands by these same agencies that they be given nearly complete responsibility for the federal obligations under the treaty. Now, however, after having obtained as much responsibility as is consistent with the overall federal responsibilities, the very states in question are now heard to complain that meeting such responsibilities costs money.

One might note, at least in passing, that one alternative for reducing state expense is, then, for the states to refuse the responsibility, thereby leaving the federal government with total responsibility and the states with no voice whatever. No one has seriously made such a suggestion. I do not do so now, but I want to note that it is at least one alternative.

A better alternative, we believe, is a cooperative working relationship, such as the one existing now, where the states have some responsibility for gathering data and conducting sound scientifically based management programs; but the federal government has, as it must, the responsibility for making, on the basis of data received, no detriment findings under the legally appropriate standards for CITES compliance.

There are at least two ways in which this management program might appropriately receive additional funding at the state level. First, and least desirable: to the extent that Congress finds the additional responsibilities on state fish and game agencies to be excessive, Congress could appropriate additional sums for these agencies, specifically for improving their management programs to meet CITES requirements. Indeed, the groups which I am representing today would be willing to consider and potentially support a proposal along those lines.

Mr. Chairman, a second, more appealing source of funding for these management programs would be to tax or charge those responsible for making these programs a necessity. You must recall, that it was neither Defenders of Wildlife, The Humane Society, the U.S. Court of Appeals, or CITES itself which required CITES protection for the bobcat. Quite the contrary, it was the furriers, trappers, and associated interests which killed or directly contributed to killing such large numbers of bobcats for the European fur market as to make CITES protection for this cat a necessity.

And, CITES, and the Court of Appeals, have only required elements of a management program (population estimates and an appropriate ceiling on the number which may be killed) which should characterize any high quality, scientifically based management program for an exploited species. Indeed, the states might well freely accept these parameters as being sound components of their management programs for all species, not just CITES listed species and non-game.

In any event, however, it follows logically that the cost necessary to provide the type of management program which is clearly necessary to meet our international obligations under CITES is best and most appropriately borne by those who are reaping the substantial profit from mass and inhumane exploitation of this species.

Alternately, if State Fish and Game Agencies wish to avoid the expense necessary to ensure bobcat survival in the face of mass exploitation, the only approach would be to reduce kill, and allow bobcat populations to rise, which would in turn allow the bobcat to be appropriately delisted.

Conclusion

The U.S. Court ruling concerning bobcat protection under CITES, far from being the travesty which some have suggested, simply represents proper interpretation of U.S. obligations under the Treaty.

As we have shown, the standards set by the Treaty and interpreted by the Court of Appeals do not present an impossible burden to the Federal Government or the state fish and wildlife agencies. Indeed, as early as the settlement discussions which began in May of 1981, Defenders of Wildlife proposed an outline of guidelines which would have allowed exports from most states and still satisfied the CITES requirements. The Federal Government and the International Association of Fish and Wildlife Agencies refused to negotiate and the settlement discussions broke down. In September 1981 when the Fish and Wildlife Service proposed export findings which failed to comply with CITES, Defenders again proposed guidelines which would allow bobcat export, while meeting the standards of CITES.

Again, the Fish and Wildlife Service refused to comply, apparently hoping that the U.S. Congress would simply alter our treaty obligations.

In fact, since February 3, 1982, when the Court of Appeals ruled, neither the Fish and Wildlife Service nor the International Association of Fish and Wildlife Agencies have taken even a single good faith step toward complying with the mandate of CITES and the Court of Appeals ruling. 1/

Now these same agencies and interests have come to Congress to ask for "relief" from the consequences of their own failure to take positive action. The travesty would occur if Congress were now to provide a legislative "fix" and back away from our international responsibilities.

In conclusion, Mr. Chairman, we commend you and Senator Mitchell for your support of endangered species and the Endangered Species Act. However, for the reasons I have presented, we strongly oppose the portions of your bill which override the Court of Appeals decision and weaken protection for the bobcat.

1/ Indeed, not until April 5, 1982, did the Fish and Wildlife Service publish proposed guidelines in compliance with the court decision. While these guidelines need some improvement, they do prove conclusively that good faith compliance with CITES and the court decision is not difficult and any amendment of the Endangered Species Act to address this matter is unnecessary and counterproductive.

Therefore, we respectfully urge that you re-evaluate your amendments, and reject any amendment to the Endangered Species Act which would alter our international or national obligations under CITES, and reaffirm that the Senate, as the courts, expects this nation to comply fully with these obligations.

Respectfully submitted,

John W. Grandy
Vice President/Wildlife
and Environment

SOCIETY FOR ANIMAL PROTECTIVE LEGISLATION
P. O. Box 3719
Georgetown Station
Washington, D.C. 20007
(202) 337-2334

STATEMENT ON S. 2309 TO REAUTHORIZE AND AMEND THE ENDANGERED SPECIES ACT

by Christine Stevens, Secretary

April 19, 1982

The Endangered Species Act has been buffeted repeatedly by those who suffer from an after-me-the-deluge outlook. The wisest possible course would be to reauthorize the Act for a long period, ten years at least, to give it more permanence and to discourage the Louis fourteenths among us from plotting ways to undermine it at the next set of hearings -- only two years from now according to S. 2309. To strike a balance that is feasible, the Society for Animal Protective Legislation recommends a four-year reauthorization.

Major newspapers throughout the country have expressed strong support for reauthorization of the Endangered Species Act and opposition to weakening amendments. For example, the New York Times editorialized on March 22nd, "it is not just conservationists who worry about the disappearance of obscure species from distant plains or jungles. Cancer specialists know that two of their most important drugs come from a single denizen of tropical rain forests, the rosy periwinkle. Seed growers, who have to develop new strains of wheat every five years or so as the old ones become susceptible to disease, understand the importance of preserving the diversity of gene pools. But the ancestral gene pools for most staple American crops lie abroad. Without foreign germ plasm, our farmers would supply little but cranberries, pecans and sunflower seeds.... the world's gene pools have already made a vital contribution to the pharmaceutical and agricultural industries, yet only 1 percent of all species have been examined for commercial value. The gathering rate of extinction can best be slowed by preserving habitat, particularly in the tropics where diversity of species is richest.... But this means denying certain uses of land to those with shorter-term purposes. Governments that might look to the United States will find little practical help, or example."

The Los Angeles Times noted on March 12th, "a coalition that includes utility companies and mining and lumber interests is trying to persuade Washington that the law is a nuisance and should be softened... Congress should resist that argument and extend the law, as is, for at least three years to continue giving endangered wildlife a fighting chance for survival. That survival is every bit as important to human beings as to the creatures and plants...."

"As long as people build dams or fell trees, they are going to break strands in the web of nature. No federal law can stop that. But it can ask developers and commercial interests to look carefully for such strands before they act.... Congress must continue to require that basic exercise of caution. It can do so by extending the Endangered Species Act without change..."

To follow your request to address specifically the proposed amendments to the Act, I would first refer to our major concern over its relationship to the Convention on International Trade in Endangered Species on Wild Fauna and Flora (CITES). We believe the Act should remain as it now stands since all of the many attempts to rewrite Section 8 have failed to retain the necessary requirements to head off danger to bobcats and other species in all states. Estimates of the population size are an appropriate way of assessing the status of a species and, as I documented at the Oversight Hearings, they are regularly used in standard wildlife management.

The Fish and Wildlife Service proposed Guidelines, published in the Federal Register of April 5, 1982, that give advice on estimating populations of bobcats and five other species, stating in part:

> "A current estimate of the total number of animals in the preharvest population is to be developed for each affected State, derived by (a) extrapolating the number of animals per unit area in each of the major habitat types to obtain an estimate of the total number of animals in the State, where the number of animals per unit area is determined by direct count, (e.g., track counts, scented track plots, hunter-trapper surveys, and/or harvest records): or (b) by using population modeling (e.g., calculating population size from data on recruitment, mortality, sex ratio, age composition, or other parameters)."

The Fish and Wildlife Conservation Act of 1980 requires "determination of the size, range, and distribution" of populations of nongame species for which conservation plans are made (Section 4, (3)(A)). This widely acclaimed law received no criticism on the matter of determining population size.

It appears, therefore, that the judicial findings in the bobcat case were entirely reasonable and ought not to be reversed by legislative means.

Some states do an excellent job of monitoring threatened species, but others have failed signally. The Endangered Species Act should not be weakened in a way which allows some states to be lax, while others do their job effectively.

It would undermine CITES for the U.S. to react to a court decision by weakening its national law. CITES now has 77 member nations and represents a major international force to prevent species extinctions. The U.S. has a heavy responsibility to the entire world in setting standards of conduct in this most important area.

The Society for Animal Protective Legislation is fully prepared to help to make the Endangered Species Act run smoothly. The proposed changes in Section 2, making experimental populations of endangered species threatened, rather than endangered, is acceptable if it is carefully enforced to avoid poaching or other dishonest commercial activity. However, it is essential to include a specific determination of any experimental population. Further, experimental populations occurring, not only on national wildlife refuges but in any part of the National Park system, should be protected.

We are concerned about the length of time allowed to list the species. As it stands, an entire three years can pass between the time a species is proposed for listing and the time at which the Government is required to have acted. Such a long period could easily result in the extinction of species while they were being considered. In Section 4(F) two years is allowed after the date of publication of general notice to publish a final determination. We suggest this period be reduced to one year allowing, however, for the possibility of a six-month extension under unusual circumstances should that be necessary.

With regard to the consultation process Section 6, the permit or license applicant, presumably a private person or company, would be given veto power with regard to the extension of the consultation period. The applicant could take part in such a determination and of course be informed about the length of the period, but must not be in a position to veto the decision of the others.

Although we recognize that ICAC has no funding, we recommend against eliminating it entirely, as proposed in S. 2309. It is useful for the Secretaries of Interior and Commerce to receive information and opinion from other agencies concerned with endangered species. Without funding at this time, there is no cost to the Government. Therefore, the elimination of ICAC would not save tax funds. Scientists and administrators with views which may differ from the two main agencies should have a means of communicating, as provided by ICAC.

The Society for Animal Protective Legislation supports the testimony of Michael Bean of the Environmental Defense Fund with respect to other provisions of S. 2309.

That completes our comment on S. 2309 specifically. In response to your invitation, Mr. Chairman, to indicate how the Bill might be improved, I would add that larger amounts of funding both for enforcement of the Act and for speeding the listing process would be highly desirable. It is only because the likelihood of obtaining such increases at the present time is so small that I do not emphasize it more strongly. The enormous increase in loss of species throughout the world, which is now taking place, is disastrous and is rapidly becoming even more so. The excellent statements of the distinguished scientists who testified at the Oversight Hearings made plain how very serious a matter this legislation is. If we cannot at this time expand and strengthen it, we must at the very least avoid weakening it. In particular, the group of proposals which their originators have so grossly mislabeled "the common sense amendments" are designed from beginning to end to subvert the Act. There is nothing sensible about enfeebling the modicum of protection which endangered species now have. Sawing off the limb on which humanity is perched, as Dr. Paul Ehrlich so graphically put it, denotes folly rather than common sense. Selfish interests that put the preservation of natural diversity far below their own commercial or recreational desires should not be allowed to destroy any part of the Endangered Species Act.

I will be glad to comment on any of the so called "common sense amendments" at the request of this distinguished Subcommittee. Thank you for the opportunity to testify.

THE AMERICAN FUR RESOURCES INSTITUTE
"America's Oldest Industry"
1901 NORTH FT. MYER DRIVE
ARLINGTON, VIRGINIA 22209
(703) 243-1087

Board of Directors

Chuck Spearman, Chairman
Major L. Boddicker
Parker L. Dozhier
Tom Krause
Duane Pursley

Stephen S. Boynton,
Washington Counsel

Central Office

P.O. Box 550
Sutton, Nebraska 68979
(402) 773-6454
or
(402) 773-4343

STATEMENT

OF

THE AMERICAN FUR RESOURCES INSTITUTE

AND

FUR TAKERS OF AMERICA

AND

NATIONAL TRAPPERS ASSOCIATION

BEFORE

SENATE SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION

OF THE

SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

April 19, 1982

MR. CHAIRMAN - My name is Stephen S. Boynton, Washington Counsel for the American Fur Resources Institute (AFRI). I am also submitting this testimony on behalf of the Fur Takers of America (FTA) and The National Trappers Association (NTA).

Mr. Chairman, there are over a half a million men and women of all ages who are trappers in the United States. Obviously, therefore, these people have a strong interest, not only in the work of this Subcommittee and Congress on the reauthorization of the Endangered Species Act, but in maintaining professional standards of scientific wildlife management practices in order to preserve and protect our wildlife for today and the future.

We appreciate the opportunity to appear before the Subcommittee to make comment on S. 2309 which amends the Endangered Species Act of 1973 and authorizes appropriations for the fiscal years 1982 and 1984. We would like to congratulate the Subcommittee and the staff on its work on this most important legislation. Significant and positive strides have been taken to improve the Act and its administration in the proposed legislation.

We would specifically applaud the change proposed in Section 8 concerning the standards to be employed when determining a no detriment finding on the survival of a given species. It is our belief that this Section clearly undoes the harm caused by the Court decision which erroneously held that "a reliable estimate of the total number of bobcat and the number of bobcats to be killed in the season" must be established before a "no detriment" finding could be made permitting the export of such pelts. We sincerely believe that Congress must recognize that the substitution of judicial opinion for professional and scientific wildlife management efforts must be eliminated. In this regard, however, we would make two important suggestions.

The language proposed states, _inter alia_:

> Such determination [of no detriment] and advise shall be based upon the best available biological information derived from _reliable wildlife management practices._ The Secretary shall not be required to use estimates of population size in advising that export or introduction will not be detrimental to the survival of

> the species or determining that export should be limited when such estimates are not the best available biological information derived from reliable wildlife management practices. [Emphasis Added]

First, we believe that the word "reliable" should be eliminated from this Section. The reason being that the subjective word of "reliable" was used in the Court opinion and, consequently, it is possible that unneeded confusion may result from its use within the Act. One suggestion would be to have it stricken and the word "scientific" substituted. However, it may be more effective to have the phrase changed to be more in keeping with established and accepted regulatory language.

For example, in the Code of Federal Regulations concerning Federal Aid To States and Fish and Wildlife Restoration, the phrase used in similar context used the words: "designed in accordance with accepted fish and wildlife conservation and management practices...." 50 CFR Subpart 80.1(g). Another example concerning regulatory treatment of the thought intended by this Section, is the recently published proposed rule for implementing the Fish and Wildlfie Conservation Act of 1980. The phrase there used was "[u]tilizes accepted conservation and management principles...." 47 FED. REG. 14739, 14742 § 83.12(b)(3) (April 6, 1982).

It is respectfully suggested that phrases that are established within regulatory administration of wildlife concerns would be more acceptable than the present suggested language and would eliminate the likelihood of a challenge on a subjective basis through administrative or legal action.

A second, and extremely important suggestion, concerning amendment to this particular Section concerns the issue of retroactivity. If Congress determines that the standards applied by the Court were inappropriate now, clearly, they were inappropriate when the Court so ruled. Consequently, it is suggested that language be placed within the bill to permit the standards to be retraoctive which would permit regulations to be promulgated to allow the export of bobcat pelts taken during the 1981-1982 season. Because of the Court decision, and the understandable inability of the U.S. Fish and Wildlife Service to write regulations based upon such judicial criteria, pelts taken during the 1981-1982 season can not be exported. Consequently, prices are extremely depressed. It is estimated that it has cost trappers some five million dollars ($5,000,000.00). Although this may seem a small amount in the total scheme of our economy, trapping is an important income producing activity for those involved.

Due to the confusion within the regulatory area, many trappers have chosen not to sell their pelts at the depressed price. Consequently, the retroactivity of this amendment would be extremely important financially. Although unnecessary disruption of the market place was caused by this litigation at considerable expense to the United States and the industry, such attention by Congress to retroactively correct the problem would be a measure of redress to those persons directly affected.

Although not offered as a suggested amendment, I believe it is appropriate to comment on the question of the need for annual no detriment findings. By the suggested amendment, Congress recognizes that many factors are programmed into the determination of the requirements concerning annual harvests. Such criteria basically relates to trends. Clearly, annual review of submitted data from the States takes considerable man hours at the State and Federal level. Consequently, it is suggested that five (5) year review by the Scientific and Management Authority would be more appropriate with exception by state if current information so warranted.

Further, to the issue of administration of the Act, obviously, reasoned implementation of the Act is as equally important to the success and achievement of Congressional intent as the enabling language. It is submitted, therefore, that over regulation can be as undesirable as the absence of adequate and appropriate regulation.

As an example of over regulation under the Endangered Species Act, I would call attention to a regulation that has not only caused excessive and non-productive paper work, but has been unnecessarily disruptive financially. I refer to the import and export license requirement which mandates that all persons or entities who engage in the export or import of wildlife must obtain a license; keep certain records and retain them for five (5) years; allow FWS to inspect records and inventories without notice and file certain reports. See 29 Fed. Reg. 8357 (March 5, 1974); 43 Fed. Reg. 12830 (March 27, 1978); 45 Fed. Reg. 86496 (Dec. 31, 1980); 50 CFR, Subpart 14. Although an exception was granted if the value of wildlife imported or exported annually is less than twenty five thousand dollars ($25,000.00), the net effect for those not exempted is to face delay through red tape, be subject to inspection without notice and excessive record keeping requirements. Many such persons have elected to make wildlife sales domestically to large wildlife dealers to avoid the hassels involved. Unfortunately, this circumstance has caused market disruption and financial loss which is totally unnecessary.

The overwhelming position of the professional wildlife managers throughout the country is that there is no data or information derived from such a requirement that is in any way useful to the managements of wildlife. Clearly, those species listed under the Endangered Species

Act or listed in the Appendices of CITES, should obviously be subject to regulation and licensing. Beyond those species, however, there is really no benefit for further regulation beyond state requirement for trade in non endangered or threatened wildlife. Practically all the regulations do is add another layer of bureaucratic paperwork for no valid purpose - requiring costly, burdensome and unnecessary work for private enterprise, as well as, the Federal Government.

Nor do we believe this regulation in any fashion aids law enforcement. With a strengthened Lacey Act [18 U.S.C. § 43-44] and other statutes administered by FWS, we can see no reason for such a regulation on the import and export of wildlife parts and pelts other than import and export involving species listed under the Endangered Species Act or the Appendices of CITES. We sincerely hope your Committee reviews this situation in committee deliberations to the extent that although Congress recognizes the need for appropriate and adequate regulations to administer the Act, it also would not encourage regulation that does not produce useful results or protection for fauna and flora.

We support the changes in the proposed legislation concerning the needed accelerated listing and the exemption processes. We also believe the change made concerning experimental populations is a positive measure. The elimination of the International Convention Advisory Commission (ICAC) we believe is a positive step in streamlining the discharge of International commitments and obligations.

In sum, we are extremely pleased with the proposed legislation and, again, congratulate the Members of the Committee and staff for their dedicated and understanding efforts on behalf of maintaining reasoned legislation for the maintenance of professional wildlife management.

STATEMENT SUBMITTED BY THE SAFARI CLUB INTERNATIONAL FOR THE HEARINGS ON THE ENDANGERED SPECIES ACT BEFORE THE SENATE SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION

APRIL 19, 1982

I am Duane Smelser, president of the Safari Club International ("SCI"). SCI is a sportsman's group dedicated to the conservation of wildlife, the preservation of sport hunting and the protection of hunters' rights. SCI represents the views held by our more than one million sportsman members, affiliates, and associates. I sincerely appreciate the opportunity today before this Subcommittee to present SCI's views and proposals on S.2309, legislation to amend the Endangered Species Act.

Sport hunting is not merely a sport, rather it is recognized as playing an immensely important and valuable role in effective wildlife conservation and management programs in the United States and abroad. It is not the sportsman who is a threat to wildlife species. Rather, the dangers to wildlife are found in the continuing loss of habitat and the illegal profit-seeking poacher who has no regard for wildlife or the laws designed to conserve and protect such resources.

The sport hunter is the true conservationist. We need not remind the Members of this Subcommittee that it has been the sportsmen of this nation who have provided more than $5 billion over the years for wildlife conservation projects through the purchase of hunting and fishing licenses, permits, fees, and other private contributions.

Since the formation of SCI merely ten years ago, I am proud to inform the Members of this Subcommittee that SCI has given over $1 million in needed equipment and direct financial assistance to a vast range of projects concerning wildlife conservation, habitat preservation, anti-poaching efforts and animal relief programs on the local, state, national and international levels. Such efforts have included the donations of telemetry equipment and the awarding of research grants for various wildlife studies. The Members of this Subcommittee might be surprised to learn that SCI has contributed substantially to restoration and conservation programs for non-game species as well, including the endangered peregrine falcon and the endangered Kirtland's warbler, both of which are obviously not game birds. Moreover, SCI has donated jeeps, trucks, landrovers, and sophisticated communications equipment to many foreign nations to aid in their efforts against poaching.

Wildlife conservation programs in many foreign nations are almost solely dependent upon the revenues generated from regulated sport hunting programs and well-controlled safari operations.

> "The [United States Fish and Wildlife] Service is convinced that in some cases permitting the importation of a legally taken leopard trophy from southern Africa will benefit the species....Because of the above considerations, the Service believes that there will be cases in which permitting the importation of leopard trophies will not only not be detrimental to the survival of the species, but will assist in their conservation. Such a situation could exist, for example in countries where the leopard is destroyed as vermin because of predation problems with livestock, but where some such depredation might be tolerated if the

> leopard has an economic value through more [sport] hunting." 47 Fed. Reg. 4,208 (1982).
>
> "American sportsmen have traditionally supplied the bulk and funds for wildlife conservation efforts in the United States. The situation is the same in Africa. If individual African nations are to develop adequate conservation programs, they will undoubtedly have to utilize funds provided by foreign hunters. [Sport hunting] will permit the African nations to continue to receive revenue from American sportsmen so that the nations can develop and implement an adequate wildlife management effort that will insure the long-term perpetuation of the resource." H.R. Rep. No. 96-661, Part 1, 96th Cong., 1st Sess. 18 (1979).

The Safari Club International fully supports the Endangered Species Act as one of the most important tools in the cause to conserve, manage, and protect wildlife resources. SCI is pleased, on the whole, with the introduction of S.2309 which proposes to reauthorize and amend the Endangered Species Act ("Act"). At this point, we wish to comment upon several provisions of S.2309.

SCI believes it is imperative that the States have adequate funding to develop conservation programs pursuant to the Act. Inasmuch, SCI strongly supports S.2309 as it proposes to increase the federal share of the federal/state cooperative program established under Section 6 of the Act. An increased federal share of the financial burden to develop and operate these programs is essential to sustain such cooperative endeavors.

SCI also endorses the proposal in S.2309 to establish an "experimental populations" category for endangered or threatened species which are introduced outside their current range. The adoption of the "experimental populations" category will lend proper and overdue recognition to those conservation efforts establishing new populations of endangered and threatened species in areas where they do not now naturally occur. SCI is pleased that in S.2309 language was included to permit certain experimental populations to be established without all of the restrictions (and affiliated burdens and delays) associated with critical habitat designations.

SCI believes that the inclusion of an "experimental populations" category into the Act will serve as a stimulus to State wildlife agencies and others to introduce or reintroduce endangered and threatened species into new areas. Yet, we are troubled by the apparent nonapplicability of the "experimental populations" category to similar wildlife conservation efforts undertaken by foreign governments and their wildlife agencies. Surely, such laudable conservation projects are not less worthy of recognition by the Members of this Subcommittee. Therefore, SCI recommends that the definition of "experimental populations" be expanded to apply to foreign populations of endangered and threatened species and the efforts by foreign nations to introduce or reintroduce such species outside their current range.

SCI also wishes to express its overall support to the proposal in S.2309 amending the listing process under Section 4 of the Act. Particularly encouraging is the language (lines

21-22 on page 4, and lines 7-9, 12-14 on page 5) which proposes to lend appropriate regulatory flexibility to the Secretaries of Interior and Commerce in dealing with threatened species.

Inasmuch as Section 4 of the Act concerns the listing process, it would be strongly advisable to incorporate therein the necessary language to provide for the removal of any species from either the endangered or threatened lists when such determinations are regarded as justifiably appropriate when pursuant to the Act. Certainly, no one wishes the Endangered Species Act to become the eternal resting-place for listed species. Rather, it is the intent of the Act to provide for the conservation of species to the point where the population hopefully may be returned to such a healthy and viable status that their listings would no longer be necessary. In keeping with the language proposed in subsection 4(b)(3) of S.2309, SCI recommends that subsection 4(b)(2) of S.2309 be amended by:

(1) inserting "or no longer in danger" immediately after "danger";

(2) inserting "or no longer likely" immediately after "likely";

(3) inserting "or may no longer be " immediately after "be"; and

(4) inserting "or delisting" immediately after "listing."

In further regard to subsection 4(b)(2) of S.2309, SCI suggests striking out "any professional scientific organization, or subdivision thereof" and inserting in lieu thereof "the general consensus of opinion in the scientific community devoted or concerned with the study of such species." While it is perfectly proper for the Secretary to pay special attention to scientific over lay information, the Secretary is not in the business of accreditation. Moreover, to require the Secretary to regularly review the status of any species upon the receipt of any study by any scientific organization would leave the Secretary too susceptible to an excessive administrative burden.

We have noted throughout S.2309 that many different terms are employed to define the type of information or data needed to determine the listing or delisting of species. In an effort to eliminate any confusion which may arise from the varying standards and for the sake of consistency, SCI believes that one term should be uniformly incorporated throughout this legislation. Inasmuch, SCI proposes that the phrase "best substantial scientific and commercial information" be considered.

SCI also strongly supports S.2309 in providing legislative relief to overrule the Court's decision in Defenders of Wildlife Inc. v. The Endangered Species Scientific Authority which blocked the bobcat export for the 1981-82 season. Although the Court's decision does not directly affect SCI's sportsman membership, it does pose a dangerous precedent for wildlife management practices and might possibly be further abused in challenging the lawful harvests of other species. At the Tenth Annual SCI Convention, which was recently held in Las Vegas, SCI adopted a resolution to join the efforts of other wildlife conservation and management organizations in seeking such legislative relief. (Such resolution is attached as an appendix to this statement).

SCI respectfully requests that S.2309 be amended to make the relief retroactive to permit the export of bobcat pelts taken in the 1981-82 season. Moreover, SCI recommends that the term "reliable" in Section 8 of S.2309 be deleted or in the least, as an alternative, be replaced with the term "scientific."

While SCI is pleased, on the whole, with S.2309, we are nonetheless disappointed that very few overtures were made in the legislation to reflect and correct many of the concerns which directly affect sportsmen, as expressed by SCI and other sportsman organizations.

Since sportsmen are true conservationists,and the purpose of the Endangered Species Act is to conserve wildlife resources, a superficial study of the Act might determine that the statute is perfectly compatible with lawful activities by sportsmen to conduct and stimulate wildlife conservation. A close examination of the Act, though, taking into consideration the first-hand familiarity of sportsmen with the Act's actual implementation and enforcement, will demonstrate that the Act causes unnecessarily troublesome and complicating problems for sportsmen. Some of the administrative requirements and law enforcement actions regarding the permits to take and import game trophies pursuant to CITES and the Act, as well as the long delays resulting from minor technicalities, are a constant source of frustration and confusion to the American sportsman who, nonetheless, makes every conscious and good faith effort to comply with the sometimes conflicting regulations.

Therefore, SCI believes that S.2309 should be amended to clarify the Act's intent regarding certain regulatory provisions, as well as to statutorily recognize certain administrative decisions which not only deserve to be incorporated into the Act, but whose inclusions are statutorily proper. SCI respectfully requests that the Members of this Subcommittee carefully consider the following proposals:

(1) Amend Section 4 of the Endangered Species Act by amending subsection (a)(1)(2) by striking out the text immediately after "commercial."

The belief apparently held by some that properly controlled sport hunting leads to the "overutilization" or depredation of wildlife is simply not true. We are not aware of any game species which sport hunting has brought to the brink of extinction. On the contrary, sport hunting as a regulated management tool lends to status enhancement of many wildlife species. Moreover, we perceive no pressing need to also condemn science or education as having "overutilized" wildlife species. We believe that properly conducted sport hunting, science, and education are consistent with the purposes of the Act.

The proposed amendment would delete the explicit reference to sporting, scientific, and educational activities as having contributed to the "overutilization" of species. It would appear that such factors, when they may seldom be such, would be more fairly and appropriately incorporated implicitly in subsection 4(a)(1)(5) which delineates all other "natural or manmade factors affecting the continued existence" of a species.

> (2) Amend Section 3 of the Endangered Species Act by amending subsection (2) by striking out the present text and inserting in lieu thereof the following:
>
> "The term 'commercial activity' means all activities of industry and trade, including, but not limited to, the buying or selling of fish or wildlife or plants and activities conducted for the purpose of facilitating such buying and selling: Provided, however, That it does not include --
>
> (A) exhibition of fish or wildlife or plants by museums or similar cultural or historical organizations; or
>
> (B) lawful dealings of a sportsman with a taxidermist, guide, outfitter, travel agent, an airline, or a shipping line."

It has been the policy of the Congress and the United States Department of the Interior to recognize properly that sport hunting does not constitute commercial activity. Since the enactment of the Endangered Species Act, it has been determined that the "commercial" aspects of a sporting hunt, such as the payment of an outfitter, guide, taxidermist, travel agent, an airline, or a shipping line, also do not constitute commercial activity.

> "The 'commercial activity' portion of Section 4(d)(1) [of the recently enacted Lacey Act Amendments of 1981] does not encompass the dealings of a hunter with his taxidermist. Such dealings clearly do not constitute a sale or purchase of wildlife. Similarly, the dealings

> of a hunter with his travel agent or an airline to arrange a trip for the acquisition of wildlife clearly does not constitute a sale or purchase of wildlife." (S. Rep. No. 97-123, 97th Cong., 1st Sess. 12 (1981) and H.R. Rep. No. 97-276, 97th Cong., 1st Sess. 21 (1981)).

This is also reflected in 50 CFR 17.3 in which the phrase "industry or trade" is defined as the actual or intended transfer of wildlife from one person to another in pursuit of gain or profit. Such definition further defines the term "commercial activity" as set out in Section 3 of the Act.

Thus, while the activities relating to sport hunting mentioned above have been determined and are regarded to be incidental to the primary purpose of the hunt, and not to constitute commercial activity in the sense of the Act, the statute itself has yet to incorporate such a distinction explicitly.

Whenever a regulation or rule is proposed or promulgated, there is recurring confusion within the sport hunting community as to any possible new applicability of the term "commercial activity" to sport hunting. Such ambiguity in these rules and regulations necessitates frequent requests by sport hunters and sportsman organizations for a clarification regarding any reference to that term.

The proposed amendment is noncontroversial since it is perfectly in line with the term "commercial activity" as it has been interpreted by the Congress and the Department of Interior. As an added safeguard, however, the word "lawful" has been included in the proposal in order to draw a very clear line between legitimate sport hunting and any possible illegal activity.

> (3) Amend Section 3 of the Endangered Species Act by amending subsection (3) by striking out the present text immediately after "transplantation," and inserting in lieu thereof the following:

"regulated sport hunting, and other regulated taking."

At the time of enactment of the Act, regulated takings were recognized as a useful and acceptable means to relieve population pressures. Yet, sport hunting was not recognized explicitly as such a conservation tool even though regulated sport hunting is utilized commonly as a means to protect and keep wildlife populations in check with their present habitat. Moreover, subsequent interpretations and policy determinations by the Department of Interior, as the Nation's principal conservation agency, have lent recognition to regulated sport hunting as an important wildlife conservation and management program. The purpose of the proposed amendment is to lend explicit and official recognition to the valuable wildlife conservation role played by sport hunting.

Moreover, the definition of the terms "conserve," "conserving," and "conservation" in the statute makes a limited reference to relieving population pressures. However, the statute does not lend proper recognition to regulated sport hunting as a stimulant to wildlife conservation efforts.

In effect, if a resident wildlife species does not represent an economic or financial value to the landowner or farmer, particularly in some of the more underdeveloped foreign nations, then one may assume that that species may come to be viewed as nothing more than vermin, and efforts may then be undertaken to remove the species as it may threaten nearby agricultural operations. The economic benefit received from sport trophy hunting (and its fees) represents the very incentive needed to persuade the landowner or farmer to manage the wildlife population and thereby protect the species from extermination in that area. In other words, sport hunting benefits species by giving economic value which, in turn, stimulates conservation measures.

> (4) Amend Section 3 of the Endangered Species Act by amending subsection (10) by striking out the present text and inserting in lieu thereof the following:
>
> "The term 'import' means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, from any place not subject to the jurisdiction of the United States to any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States; Provided, however, that the term 'import' shall not include the transit or trans-shipment through any place subject to the jurisdiction of the United States of non-commercial shipments of sport hunting trophies of fish or wildlife lawfully exported from the country of origin or country of re-export and destined to a country where they may be lawfully received, while such sport hunting trophies remain in United States customs control."

Under the Act, the definition of the term "import" could be applied to movement of fish or wildlife or plants from Alaska (Hawaii, Guam, etc.) to the contiguous United States because of the nonapplicability of United States Customs law. Such a broad definition was apparently intended to cover situations in which certain wildlife, such as fowl or swine, are brought into this country and an "importation" within the meaning of the United States customs laws does not occur until the wildlife has undergone a quarantine period and has been cleared formally for entry by the U.S. Customs Service. (See S. Rep. No. 97-123, 97th Cong., 1st Sess. 5 (1981)).

The proposed amendment would eliminate any possible misapplication and discrimination of the term "import" to shipments from Alaska, etc. to the contiguous United States, while retaining the provision in the Act which provides for the quarantine importation periods in order to prevent outbreaks of disease, including Newcastles disease.

Secondly, it had been the policy of the United States Fish and Wildlife Service, in cooperation with the United States Customs Service, to seize non-commercial foreign shipments of sport hunted trophies which were taken legally in the country of origin, exported legally from the country of origin or re-export, and destined to a country where such sport hunted trophies may be lawfully received and possessed, if such species was listed as "endangered" under the Act. Such intransit foreign shipments through the United States had been considered to be in violation of the Act.

Recently, however, in recognition of such accidental landings of sport hunted trophies into the United States, the Department of the Interior issued some new law enforcement policies.

One directive states that non-commercial foreign shipments of sport hunted trophies of species listed as "endangered" under the Act shall not be seized while such are intransit through the United States. (See Law Enforcement Memoranda 88, U.S. Department of the Interior, Sept. 4, 1981).

The proposed amendment would incorporate the new law enforcement directive into the Act and would retain the right to inspection by the United States Fish and Wildlife Service. A similar and almost identical provision presently exists under the regulations implementing the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES Treaty).

(5) Amend Section 9 of the Endangered Species Act by amending subsection (b)(1) by striking out the present text and inserting in lieu thereof the following:

> "The provisions of this section shall not apply to any fish or wildlife held in captivity or in a controlled environment on December 28, 1973, or on the effective date when such species of fish or wildlife is first listed by the Secretary pursuant to final regulation, if the purposes of such holding are not contrary to the purposes of this chapter; except that this subsection shall not apply in the case of any fish or wildlife held in the course of a commercial activity. With respect to any act prohibited by this section which occurs after a period of 180 days from December 28, 1973, or after a period of 180 days from the effective date of such first listing, as the case may be, there shall be a rebuttable presumption that the fish or wildlife involved in such act was not held in captivity or in a controlled environment on December 28, 1973.

Presently it is possible an argument could be made that if a species is listed for the first time in 1982 as "endangered" under the Act, then the prohibitions pursuant to Section 9 of the Act could apply to such species effective December 28, 1973 as opposed to the date of its actual first-time listing. Hence, the proposed amendment merely seeks to clarify the Act to ensure that it is consistent with notions of due process and the prohibition against ex post facto laws.

(6) Amend Section 9 of the Endangered Species Act by amending subsection (b) by adding at the end thereof the following:

> "(3) Except as prohibited by subsection (c)(1), this section shall not apply to sport hunting trophies of fish or wildlife taken lawfully as part of a conservation or management or culling program maintained for purposes not contrary to the purposes of this chapter; Provided, however, if such fish or wildlife is not subject to the provisions of subsection (c)(1) but is listed as an endangered species pursuant to section 1533 of this title, then the provisions of this section shall apply to such fish or wildlife, except as provided in section 1535(g)(2) and 1539 of this title."

At the present time, there are many wildlife species which are listed as "endangered" under the Endangered Species Act which may be legally taken by a sport hunter as part of a wildlife conservation, management or culling program in the country of origin, and may be legally exported from the country of origin or the country of re-export. However, due to the listing of the species as "endangered" under the Act, any importation into the United States of the sport hunted trophies of such species is prohibited.

Two examples of foreign species listed as "endangered" under the Endangered Species Act which may be legally taken as sport hunted trophies from game-breeding ranches in South Africa are the bontebok antelope, and the southern white rhinoceros. Recently, the United States Fish and Wildlife Service began a review procedure of applications for the importation of sport hunted trophies of both species. Provided such trophies are legally taken from the aggressive and highly successful breeding programs in South Africa, such permit applications are apparently now being approved. Moreover, the leopard in southern Africa is an example of a non-captive foreign species which until March 1, 1982 had been listed as "endangered" under the Act, yet it was being taken legally by sportsmen throughout much of southern Africa.

The proposed amendment gives recognition to the conservation effects of sport trophy hunting without impinging upon the international obligations of the United States under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES Treaty"). In the case where a species is listed as "endangered" under the Act and is also listed under the CITES Treaty, ownership of a sport hunted trophy of such species would be restricted to instances where the proper permit pursuant to the regulations of the CITES Treaty has been obtained. In the rare case where a species is listed as "endangered" under the Endangered Species Act but is not listed under the CITES Treaty, ownership of a sport hunted trophy of such species would be restricted to instances where the proper permit has been obtained from the Secretary.

In any event, in recognition of the valuable conservation effects of sport hunting, it is only legally taken sport hunted trophies which are involved. It is hoped that the effect of the proposed amendment would be to encourage foreign nations particularly to undertake aggressive wildlife management projects similar to those of the bontebok and white rhinoceros in South Africa, to stimulate conservation programs in those nations.

(7) Amend Section 9 of the Endangered Species Act by amending subsection (g) by striking out the present text and inserting in lieu thereof the following:

> "It is unlawful for any person subject to the jurisdiction of the United States to attempt to commit any offense defined in this section."

The proposed amendment would make the Act analagous to Section 3(a)(5) of Public Law 97-79 (The Lacey Act Amendments of 1981) by deleting language on solicitation and causation as such provisions are unnecessarily repetitious of Section 2(b) of title 18, United States Code.

(8) Amend Section 11 of the Endangered Species Act by amending subsection (a)(1) by striking out the last sentence thereof and inserting thereof the following:

> "...The court shall have jurisdiction to hear and decide any such action. In hearing such action, the court shall have authority to review the violation and the assessment of the civil penalty de novo."

At the present time, the Act uses a substantial evidence rule but as the debate on Public Law 97-79 (The Lacey Act Amendments of 1981) made clear, the Congress found merit in the position that the court should be able to make its own determination of fact. The purpose of the proposed amendment is to conform the proceedings of civil penalty review in the Act to that section in Public Law 97-79.

In some circles, it might be argued that the purposes of some of our proposals might be best satisfied in an administrative fashion. However, it is simply inadequate to settle substantive issues administratively as this does not diminish or eliminate the unfortunate pendular swing between protectionist and consumptive interpretations and implementation of the Act caused by national elections.

Sportsmen are true conservationists, and, as a group, are one of the most ardent supporters of the Act and the noble goals therein. Explicit recognition within the Act itself of the important values and contributions of sport hunting to proper wildlife management and conservation would go far in dispelling the omnipresent paranoia among sportsmen that their historical right to hunt as a meaningful recreational pursuit is threatened whenever a new or revised regulation or statute looms on the horizon.

Thank you, Mr. Chairman, for having afforded SCI the opportunity today to present our views on your legislation to reauthorize and amend the Endangered Species Act of 1973.

Safari Club International
(A NEVADA CORPORATION)

Donald Santarelli
Legal Counsel
2033 M Street, N.W.
Suite 700
Washington, D.C. 20036
202-466-6800

Duff C. Hearon
Legal Counsel
33 North Stone Avenue
Tucson, Az. 85701
602-622-3531

OFFICERS
Chairman of the Board
C. J. McELROY
President
RICHARD URSEM
President-Elect
DUANE SMELSER
Vice-Presidents
ANDY ANDERSON
RAYMOND CAPPELLI
THOMAS WASHINGTON
Secretary
JACK JONAS
Treasurer
SAM BORSELLINO
Trophy Awards Vice-President
CAPTAIN JOHN BRANDT
Regional Vice-Presidents
RICHARD ALLERKAMP
DOUGLASS BAKER
JAMES HEBERT
MICHAEL NORDBERG
COOK SCHIAVONE, JR.
MARION SCOTT
JOHN SULLIVAN, JR.
DIRECTORS-AT-LARGE
TOM BASS
BYRON ENGLE
DOOLEY GILCHRIST
ROMAN HUPALOWSKI
GEORGE LANDRETH
JOE LAWLER
ANDY OLDFIELD
THOMPSON TEMPLE
NORDEN VAN HORNE
MARION VAN SLOOTEN
DAVID WARD

At its Tenth Annual Convention held in Las Vegas, Nevada on March 31-April 3, 1982, the Safari Club International passed the following resolution:

WHEREAS, the Safari Club International is a world-wide organization of sportsmen dedicated and committed to the conservation of wildlife, the preservation of hunting, and the protection of hunters' rights; and

WHEREAS, all cats potentially involved in the fur trade, including the bobcat, were inappropriately listed on Appendix II at the First Meeting of the Parties of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES); and

WHEREAS, CITES requires that any export of bobcat pelts cannot occur unless the United States Scientific and Management Authorities determine that such export would not be detrimental to the survival of the species; and

WHEREAS, in the case of the Defenders of Wildlife, Inc. v. The Endangered Species Scientific Authority, the United States Court of Appeals ruled that "reliable estimates of population" are required to permit the taking of bobcats for export; and

WHEREAS, such narrowly-defined biological information is difficult to obtain and wholly unnecessary for sound wildlife management decisions since population trend data based upon the best available information is universally recognized by professional wildlife managers as one means of providing

INTERNATIONAL
CONSERVATION OF WILDLIFE
PROTECTION OF THE HUNTER
BOARD

Safari Club International
(A NEVADA CORPORATION)

Donald Santarelli
Legal Counsel
2033 M Street, N.W.
Suite 700
Washington, D.C. 20036
202-466-6800

Duff C. Hearon
Legal Counsel
33 North Stone Avenue
Tucson, Az. 85701
602-622-3531

Page Two

OFFICERS
Chairman of the Board
C. J. McELROY
President
RICHARD URSEM
President-Elect
DUANE SMELSER
Vice-Presidents
ANDY ANDERSON
RAYMOND CAPPELLI
THOMAS WASHINGTON
Secretary
JACK JONAS
Treasurer
SAM BORSELLINO
Trophy Awards Vice-President
CAPTAIN JOHN BRANDT
Regional Vice-Presidents
RICHARD ALLERKAMP
DOUGLASS BAKER
JAMES HEBERT
MICHAEL NORDBERG
COOK SCHIAVONE, JR.
MARION SCOTT
JOHN SULLIVAN, JR.
DIRECTORS-AT-LARGE
TOM BASS
BYRON ENGLE
DOOLEY GILCHRIST
ROMAN HUPALOWSKI
GEORGE LANDRETH
JOE LAWLER
ANDY OLDFIELD
THOMPSON TEMPLE
NORDEN VAN HORNE
MARION VAN SLOOTEN
DAVIE WARD

adquate determination for the establishment of seasons and bag/limits; and

WHEREAS, such findings of the Court might be used in setting a standard by which anti-hunting forces may challenge the lawful harvesting of other species; now, therefore;

BE IT RESOLVED, that the Safari Club International respectfully requests the United States Congress, during the reauthorization of the Endangered Species Act, to provide legislative relief to overturn such findings of the Court and to provide for the lawful taking of bobcats for export.

II

97TH CONGRESS
2D SESSION

S. 2309

To amend the Endangered Species Act of 1973, to authorize funds for fiscal year 1983, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MARCH 30 (legislative day, FEBRUARY 22), 1982

Mr. CHAFEE (for himself, Mr. MITCHELL, and Mr. GORTON) introduced the following bill; which was read twice and referred to the Committee on Environment and Public Works

---

A BILL

To amend the Endangered Species Act of 1973, to authorize funds for fiscal year 1983, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Endangered Species Act Amendments of 1982".

SEC. 2. EXPERIMENTAL POPULATIONS.—(a) Section 3 of the Endangered Species Act of 1973 is amended by—

(1) inserting before paragraph (7) thereof the following new paragraph:

"(7) The term 'experimental population' means any population (including eggs, propagules, or individuals) of an endangered or threatened species, including offspring arising solely from such population, that—

"(A) any person authorized by the Secretary has transported and released outside of the current range of the species to further its conservation pursuant to the Act; and

"(B) is wholly separate geographically from nonexperimental populations of the species: *Provided, however,* That a population transported and released outside of the current range of the species by any person authorized by the Secretary to further its conservation pursuant to the Act that is not wholly separate geographically from nonexperimental populations shall be treated as an experimental population in those areas where, and at those times when, it is wholly separate geographically from nonexperimental populations."; and

(2) redesignating paragraphs (7) through (21) as paragraphs (8) through (22), respectively.

(b) Section 10(a) of the Endangered Species Act of 1973 is amended by—

(1) striking out "." following "PERMITS" and inserting in lieu thereof the following: "AND EXPERIMENTAL POPULATIONS.—(1)";

(2) inserting ", including, but not limited to, acts associated with the establishment of experimental populations" immediately after "species"; and

(3) adding at the end thereof the following new paragraphs:

"(2) Any experimental population shall be treated as a threatened species and, as provided in section 4(d), the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species: *Provided, however*, That if the Secretary determines, on the basis of the best available biological information, that an experimental population, other than an experimental population occurring on a national wildlife refuge, is not essential to the continued existence of an endangered or threatened species, he shall by regulation, specify that, solely for the purposes of subsections 7(a)(2), 7(a)(3), and 7(c), such experimental population shall be treated as a species proposed to be listed under section 4: *Provided, further*, That no critical habitat shall be designated for such nonessential populations.

SEC. 3. COOPERATION WITH THE STATES.—Section 6 of the Endangered Species Act of 1973 is amended by—

(1) striking out "66⅔ per centum" in subsection (d)(2)(i) thereof and inserting in lieu thereof "75 per centum"; and

(2) striking out "75 per centum" in subsection (d)(2)(ii) thereof and inserting in lieu thereof "90 per centum".

SEC. 4. LISTING PROCESS.—Section 4 of the Endangered Species Act is amended by—

(1) amending subsection (a)(1) by—

(A) amending that part of subsection (a)(1) which precedes clause (1) by inserting "promulgated in accordance with subsection (b) of this section" immediately after "shall by regulation";

(B) redesignating clauses (1) through (5) as clauses (A) through (E), respectively; and

(C) striking out the last two sentences thereof.

(2) amending subsection (a)(2)(A) by—

(A) striking out "or" in subclause (i);

(B) inserting "or" immediately after "endangered species," in subclause (ii);

(C) adding immediately after subclause (ii) the following new subclause:

"(iii) be subject to more restrictive regulations, in the case of threatened species,"; and

(D) striking out "list such species in accordance with this section" and inserting in lieu thereof "implement such action";

(3) amending subsection (a)(2)(B) by—

(A) striking out "or" in subclause (i);

(B) inserting "or" immediately after "threatened species," in subclause (ii); and

(C) adding immediately after subclause (ii) the following new subclause:

"(iii) be subject to less restrictive regulations, in the case of threatened species,".

(4) amending subsection (a)(2)(C) by—

(A) striking out "and may not" immediately after "species,"; and

(B) inserting "or make less restrictive the regulations applicable to any such species listed as threatened species," immediately after "which are listed,".

(5) amending subsection (a) by adding at the end thereof the following new paragraph:

"(3) The Secretary shall, concurrent with the determination of the status and the listing of endangered or threatened species, to the maximum extent prudent and determinable, designate the critical habitat of any endangered or threatened species and promulgate appropriate protective regulations for threatened species as provided in subsection (d) of this section. The procedures that govern the designation of critical habitats and the promulgation of appropriate protective regulations for threatened species shall be the same as those that pertain to the listing of species under paragraph (5) of subsection (b) of this section, except that in determining the critical habitat of any endangered or threatened species, the Secretary shall consider the economic impact, and any other relevant impacts, of specifying any particular area as critical habitat, and he may exclude any such area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species.".

(6) striking out subsection (b) and inserting in lieu thereof the following:

"(b) BASIS FOR DETERMINATIONS.—(1) The Secretary shall make determinations required by subsection (a) of this section on the basis of the best scientific and commercial data available to him, taking into account those efforts, if any, being made by any state or foreign nation, or any political subdivision thereof, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

"(2) The Secretary shall regularly review the status of all species which have been identified as in danger of extinction or likely to become so within the foreseeable future by any professional scientific organization, or subdivision thereof, or by any agency of a state or of a foreign nation responsible for the conservation of fish or wildlife or plants and shall determine whether there is substantial scientific information that such species may be endangered or threatened and, within 12 months of such determination, determine whether to propose for listing, pursuant to paragraph 5 of this subsection, any such species and publish such determination and his reasons therefore in the Federal Register.

"(3) The Secretary shall, within 90 days of the receipt of a petition of an interested person under subsection 553(e) of title 5, United States Code, to add any species to or remove any species from either of the lists published pursuant to subsection (c) of this section, determine and publish a finding whether such petition presents substantial scientific information that such addition or removal may be warranted. If the Secretary determines that the petition presents such substantial scientific information, he shall, within 12 months of the receipt of such petition, determine whether to propose such addition or removal pursuant to paragraph (5) of this subsection and publish such determination and his reasons therefore in the Federal Register.

"(4) Except as provided in paragraphs (5) and (6) of this subsection, the provisions of section 553 of title 5, United States Code (relating to rulemaking procedures), shall apply to any regulations promulgated to carry out the purposes of this Act.

"(5) In the case of any regulation proposed by the Secretary to carry out the purposes of this section with respect to the determination of the status and the listing of endangered or threatened species, the Secretary—

"(A) shall not less than 90 days before the effective date of the regulation—

"(i) publish a general notice and the complete text of the proposed regulation in the Federal Register; and

"(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency responsible for the conservation of fish or wildlife or plants in each State in which the species is believed to occur, and invite the comment of such agency thereon;

"(B) shall, insofar as practical, in cooperation with the Secretary of State, give notice of the regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon;

"(C) shall give notice of the regulation to such professional scientific organizations as he deems appropriate;

"(D) shall publish a summary of the regulation in newspapers of general circulation in the areas in which the species is believed to occur;

"(E) shall, if any person files a request for a public hearing within 45 days after the date of publication of general notice, hold a public hearing thereon; and

"(F) shall, within 2 years after the date of publication of general notice, publish a final determination with respect to such listing, with such determination based solely upon the factors set forth in paragraph (1) of subsection (a) of this section. If the Secretary determines that a proposal to add a species to any list published pursuant to subsection (c) of this section shall not be published as a final regulation, he shall not again propose a regulation to add such species to such list unless he determines that sufficient new information is available to warrant the proposal of a regulation.

"(6) Neither paragraph (4) or (5) of this subsection nor section 553 of title 5, United States Code, shall apply to any regulation (including any regulation implementing section 6(g)(2)(B)(ii) of this Act) issued by the Secretary in regard to any emergency posing a significant risk to the well-being of any species of fish or wildlife or plants, but only if (I) at the time of publication of the regulation in the Federal Register the Secretary publishes therein detailed reasons why such regulation is necessary, and (II) in the case such regulation applies to resident species of fish, wildlife, and plants, the Secretary gives actual notice of such regulation to the agency responsible for conservation of fish or wildlife or plants in each State in which such species is believed to occur. Such regulation shall, at the discretion of the Secretary, take effect immediately upon publication of the regulation in the Federal Register. Any regulation promulgated under the authority of this paragraph shall cease to have force and effect at the close of the 240-day period following the date of publication unless, during such 240-day period, the rulemaking procedures which would apply to such regulation without regard to this paragraph are compiled with. If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best scientific and commercial date available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.

"(7) The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this Act shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulations.

"(8) Any proposed or final regulation which specifies any critical habitat of any endangered species or threatened species shall be based on the best scientific data available, and the publication in the Federal Register of any such regulation shall, to the maximum extent practicable, be accompanied by a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation.".

(7) amending subsection (c) by—

(A) striking out paragraphs (2) and (3) thereof and inserting in lieu thereof the following:

"(2) Any list in effect on the day before the date of the enactment of the Endangered Species Act Amendments of 1982 of species of fish or wildlife or plants determined by the Secretary to be threatened or endangered shall remain in effect unless and until changed in accordance with paragraph (5) of subsection (b) of this section."; and

(B) redesignating paragraph (4) thereof as paragraph (3).

(8) amending subsection (d) by striking out "section 6(a)" and inserting in lieu thereof "section 6(e)".

(9) striking out subsection (f) thereof.

(10) amending subsection (h) by—

(A) striking out "subsection (c)(2)" in paragraph (1) and inserting in lieu thereof "subsection (b)(3)"; and

(B) striking out "subsection (g)" in paragraph (4) and inserting in lieu thereof "subsection (h)".

(11) redesignating subsections (g) and (h) as subsections (f) and (g), respectively.

SEC. 5. EXEMPTION PROCESS.—(a) Section 7(e)(10) of the Endangered Species Act of 1973 is amended by striking out the first sentence thereof.

(b) Section 7(g) of the Endangered Species Act of 1973 is amended by—

(1) striking out "CONSIDERATION BY REVIEW BOARD" immediately after "APPLICATION FOR EXEMPTION AND" and inserting in lieu thereof "REPORT TO THE COMMITTEE";

(2) amending paragraph (1) by—

(A) inserting "(A)" immediately after "(1)";

(B) striking out "a review board in the manner provided in this subsection," immediately after "shall be considered initially by" and inserting in lieu thereof "the Secretary";

(C) striking out "the review board." immediately after "a report is made by" and inserting in lieu thereof "the Secretary pursuant to paragraph (5) of this subsection. Such report shall be made by the Secretary of the Interior, in consultation with the other members of the committee: *Provided, however,* That if the application for an exemption is filed with respect to an agency action for which a biological opinion of the Secretary of the Interior indicated that such agency action would violate subsection (a)(2) of this section, such report shall be made by the Secretary of Commerce, in consultation with the members of the committee."; and

(D) adding at the end thereof the following:

"(B) If biological opinions of both the Secretary of the Interior and the Secretary of Commerce indicate that an agency action would violate subsection (a)(2) of this section, such Secretaries shall jointly make a report, pursuant to paragraph (5), on any application for exemption filed with respect to such agency action.".

(3) amending paragraph (2)(A) by—

(A) striking out ": or" immediately after "consultation process" and inserting in lieu thereof "; except that"; and

(B) striking out "," immediately after "license applicant" and inserting in lieu thereof "such application shall be submitted".

(4) amending paragraph (2)(B) by—

(A) inserting "(i)" immediately after "promptly";

(B) striking out "to the review board to be established under paragraph (3) and"; and

(C) inserting "; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.".

(5) Striking out paragraphs (3), (4), and (5) thereof and inserting in lieu thereof the following:

"(3) The Secretary shall within 20 days of the receipt of an application for exemption—

"(A) determine that the Federal agency concerned and the exemption applicant have—

"(i) carried out the consultation responsibilities as described in subsection (a) of this section in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed agency action which would not violate subsection (a)(2) of this section; and

"(ii) conducted any biological assessment required by subsection (c); or

"(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the threshold requirements set forth in subclauses (i) and (ii) of this paragraph. Such a denial shall be considered final agency action for purposes of chapter 7 of title 5 of the United States Code.".

(6) striking out paragraph (6) thereof and inserting in lieu thereof the following:

"(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the threshold requirements set forth in subclauses (i) and (ii) of paragraph (3), he shall, in consultation with the members of the committee, proceed to conduct hearings and prepare the report to be submitted pursuant to paragraph (5).".

(7) amending paragraph (7) thereof by—

(A) striking out that part of paragraph (7) which precedes clause (A) and inserting in lieu thereof "Within 150 days after making the determination under paragaph (3) or within such other period of time as is agreeable to the Federal agency concerned, the exemption applicant and the Secretary, the Secretary shall submit to the committee a report discussing—";

(B) striking out "." immediately after "by the committee" in clause (C) and inserting in lieu thereof "; and";

(C) adding at the end thereof the following:

"(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d). ";

and

(D) redesignating paragraph (7) as paragraph (5).

(8) redesignating paragraph (8) as paragraph (6).

(9) amending paragraph (9) thereof by—

(A) striking out that part of paragraph (9) which precedes clause (A) and inserting in lieu thereof "In carrying out his duties under this subsection, the Secretary may—";

(B) striking out "review board" in clause (A) and inserting in lieu thereof "Secretary";

(C) striking out "it" immediately after "necessary to enable" in clause (B) and inserting in lieu thereof "him";

(D) striking out "review board" in clause (B) and inserting in lieu thereof "Secretary"; and

(E) redesignating paragraph (9) as paragraph (7).

(10) amending paragraph (10) thereof by—

(A) striking out "a review board" immediately after "Upon request of" and inserting in lieu thereof "the Secretary"; and

(B) striking out "review board to assist it in carrying out its" immediately after "such agency to the" and inserting in lieu thereof "Secretary to assist him in carrying out his"; and

(C) redesignating paragraph (10) as paragraph (8).

(11) amending paragraph (11) by—

(A) striking out "a review board" immediately after "shall provide to" and inserting in lieu thereof "the Secretary";

(B) striking out "review board" immediately after "services as the" and inserting in lieu thereof "Secretary"; and

(C) redesignating paragraph (11) as paragraph (9).

(12) amending paragraph (12) thereof by—

(A) striking out "of review boards" and inserting in lieu thereof "resulting from activities pursuant to this subsection"; and

(B) redesignating paragraph (12) as paragraph (10).

(c) Section 7(h)(1) of the Endangered Species Act of 1973 is amended by—

(1) striking out "90 days of receiving the report of the review board under subsection (g)(7)" immediately after "exemption within" and inserting in lieu thereof "30 days of receiving the report of the Secretary pursuant to subsection (g)(5)"; and

(2) striking out "review board" immediately after "the report of the" in clause (A) and inserting in lieu thereof "Secretary"; and

(3) inserting immediately after "habitat concerned." in paragraph (B) the following new paragraph:

"(C) The Committee shall not grant an exemption from the requirements of subsection (a)(2) for an agency action if the Secretary's report, submitted to the committee pursuant to subsection (g)(5), concludes that the Federal agency concerned or the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) and the committee concurs with that conclusion.".

SEC. 6. CONSULTATION PROCESS.—Section 7(b) of the Endangered Species Act of 1973 is amended by striking out "mutually agreeable to the Federal agency and the Secretary." and inserting in lieu thereof "agreeable to the Federal agency, the permit or license applicant, if any, and the Secretary. When the consultation period is extended by agreement, the Secretary shall specify the information required to complete the consultation and the date on which the biological opinion will be completed.".

SEC. 7. Section 7 of the Endangered Species Act of 1973 is amended by striking out subsection (o) thereof and inserting in lieu thereof the following:

"(o) Exception on Taking.—Notwithstanding sections 4(d) and 9(a) of this Act or any regulations promulgated pursuant to such sections, any activity that is within the scope of the action and situation—

"(1) addressed in a biological opinion which was rendered pursuant to subsection (b) of this section and which concludes that such action—

"(A) will promote the conservation of listed species or critical habitat; or

"(B) is not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat;

"(2) recommended by the Secretary pursuant to subsection (b) of this section as a reasonable and prudent alternative; or

"(3) for which an exemption is granted pursuant to subsection (h) of this section shall not be considered a taking of any endangered or threatened species".

Sec. 8. Convention Implementation.—Section 8A of the Endangered Species Act of 1973 is amended by—

(1) inserting "(1)" immediately after "Scientific Authority Functions.—", in subsection (c);

(2) adding at the end of subsection (c) the following new paragraph:

"(2) In accordance with article IV of the convention, the Secretary shall determine and advise whether the export or introduction of any specimen of a species included in appendix II of the convention will not be detrimental to the survival of that species and whether the export of such specimens should be limited. Such determination and advice shall be based upon the best available biological information derived from reliable wildlife management practices. The Secretary shall not be required to use estimates of population size in advising that export or introduction will not be detrimental to the survival of a species or determining that export should be limited when such estimates are not the best available biological information derived from reliable wildlife management practices.";

(3) striking out subsection (d); and

(4) redesignating subsection (e) as subsection (d).

SEC. 9. ENFORCEMENT.—Section 11(e) of the Endangered Species Act of 1973 is amended by adding at the end thereof the following new paragraph:

"(6) The Attorney General of the United States may seek to enjoin any person who is alleged to be in violation of any provision of this Act or regulation issued under authority thereof.".

SEC. 10. MISCELLANEOUS.—Section 10 of the Endangered Species Act of 1973 is amended by striking out subsection (i) thereof.

SEC. 11. AUTHORIZATIONS.—(a) Section 15 of the Endangered Species Act of 1973 is amended to read as follows:

"AUTHORIZATION OF APPROPRIATIONS

SEC. 15. Except as authorized in sections 6 and 7 of this Act, there are authorized to be appropriated—

"(1) not to exceed $27,000,000 for each of fiscal years 1983, 1984, and 1985 to enable the Department of the Interior to carry out such functions and responsibilities as it may have been given under this Act;

"(2) not to exceed $3,500,000 for each of fiscal years 1983, 1984, and 1985 to enable the Department of Commerce to carry out such functions and responsibilities as it may have been given under this Act, and

"(3) not to exceed $1,850,000 for each of fiscal years 1983, 1984, and 1985 to enable the Department of Agriculture to carry out its functions and responsibilities with respect to the enforcement of this Act and the convention which pertain to the importation of terrestrial plants.".

(b) Section 6 of the Endangered Species Act of 1973 is amended by striking out subsection (i) thereof and inserting in lieu thereof the following:

"(i) APPROPRIATIONS.—For the purposes of this section, there are authorized to be appropriated not to exceed $6,000,000 for each of fiscal years 1983, 1984, and 1985.".

(c) Section 7 of the Endangered Species Act of 1973 is amended by striking out subsection (q) thereof and inserting in lieu thereof the following:

"(q) There are authorized to be appropriated to the Secretary to assist him and the committee in carrying out their functions under subsections (e), (f), (g), and (h) of this section not to exceed $600,000 for each of fiscal years 1983, 1984, and 1985. The chairman of the committee shall report to the Congress before the end of fiscal year 1983 with respect to the adequacy of the budget authority contained in this subsection.".

SEC. 12. EFFECTIVE DATE.—This Act shall take effect on the date of its enactment.

○

ENDANGERED SPECIES ACT AMENDMENTS OF 1982

THURSDAY, APRIL 22, 1982

U.S. Senate,
Committee on Environment and Public Works,
Subcommittee on Environmental Pollution,
Washington, D.C.

The subcommittee met at 10:30 a.m. in room 4200, Dirksen Senate Office Building, Hon. John H. Chafee (chairman of the subcommittee) presiding.

Present: Senators Chafee, Gorton, and Mitchell.

OPENING STATEMENT OF HON. JOHN H. CHAFEE, U.S. SENATOR FROM THE STATE OF RHODE ISLAND

Senator **Chafee**. Ladies and gentlemen, we welcome you here for this continuation of the hearings that we started Monday on S. 2309, the Endangered Species Act amendments. Monday we heard from a wide range of witnesses who represented the views of the administration, the State wildlife agencies, other professional wildlife managers, environmental groups, hunters, and trappers.

The unanimous support for our bill was encouraging. It is particularly satisfying to hear that Secretary Watt and the Department of the Interior are supportive of our effort to enact S. 2309. The testimony we heard was helpful. Witnesses presented constructive criticism and specific suggestions. I encourage the witnesses today to do the same. We don't want just broadside criticisms, let's be specific and constructive.

The timely reauthorization of the Endangered Species Act, as you know, is one of my top priorities of this session. I believe that S. 2309 maintains the integrity of the act. I remind proponents to change that if they expect us to favorably consider their proposals, they, too—these proposals that they present—must also maintain the integrity of the act.

Senator Simpson regrets that he will not be able to be here today. He has submitted a statement which we will enter into the record.

OPENING STATEMENT OF HON. ALAN K. SIMPSON, U.S. SENATOR FROM THE STATE OF WYOMING

I would like to take this opportunity to applaud the efforts of the subcommittee chairman, Mr. Chafee, which have resulted in suggested changes to the Endangered Species Act that should made this legislation a more workable and credible framework for wildlife protection.

The suggested revisions to the Endangered Species Act are not in any way an effort to "weaken" the act, but it is an effort to define and designate what groups and agencies should shoulder the burden of responsible wildlife management practices. Senator Chafee has directed his efforts toward making experienced wildlife experts the source of rational decisionmaking on wildlife issues that demand our immediate attention—the protection of declining life form populations. No wildlife protection program can remain credible or effective if professional wildlife managers are not allowed to participate directly in the decisionmaking process. Senator Chafee's bill—S. 2309—contains needed revisions in language dealing with bobcat pelt exportation. These revisions represent responsible management alternatives while maintaining recognition of our obligations to international treaty provisions.

Another important issue that has been addressed in this legislation is critical habitat designation criteria. The practical recognition that certain conflicts exist between wildlife preservation goals and economic activities is implicit in the section dealing with experimental population management practices, and this is so necessary if unnecessary and feckless conflicts are to be avoided in the future. Preservation of threatened or endangered species and the conduct of responsible commercial activities are not mutually exclusive goals if reason and caution are exercised—and in this respect John Chafee is surely on the right track. I commend him.

Senator **Chafee**. Let's proceed. The first panel will be Dr. James Tate, western regional council; Roland Fischer, Colorado River Water Conservation District; Patrick Parenteau of the National Wildlife Federation; and Samuel Tucker and John Cagnetta from the Edison Electric Institute.

Would you all please come up.

STATEMENTS OF DR. JAMES TATE, WESTERN REGIONAL COUNCIL; ROLAND C. FISCHER, COLORADO RIVER WATER CONSERVATION DISTRICT; PATRICK PARENTEAU, NATIONAL WILDLIFE FEDERATION; AND W. SAMUEL TUCKER AND JOHN CAGNETTA, EDISON ELECTRIC INSTITUTE

Senator **Chafee**. We will start off with Dr. Tate from the Western Regional Council.

What we will do is listen to each of the statements, then we will have questions. Dr. Tate, if you would proceed, we would appreciate it.

Mr. **Tate**. Thank you

Senator **Chafee**. Gentlemen, all your statements will go in the record. To the extent you can, summarize them, although I don't want you to inhibit yourselves in any way from expressing what you truly want to express.

Go to it.

Mr. **Tate**. In prior testimony before this subcommittee, we have identified three areas of the ESA, Endangered Species Act, we wanted to address. I will summarize our comments on the bill itself.

Those three areas are a need for provisions that would remove the delay and the uncertainty in section 7, consultation process, the need to clarify the definition of critical habitat and the need for provisions in the act what will encourage the application of experimental management techniques to endangered species.

We are pleased to see that the subcommittee has addressed the Western Regional Council's major concerns here. We do believe that you have taken important steps to meet some of the needs of industry without adversely affecting the act. I would like to address each of these three issues briefly in the context of the bill.

The first one is section 7, consultation process—that will be near the end of my testimony. The consultation process in its present form in the law is not clearly defined and certainly is not explicit. On this point, most observers can agree the lack of definition can cause project delays and more importantly for us, it causes uncertainty of the date certain.

The Western Regional Council in earlier hearings proposed amendments to the process which it felt would remove the delay and the uncertainty that is inherent.

Although the Senate bill S. 2309 does not include the exact WRC proposal, it does include language which addresses the delay and the uncertainty issue. We are most gratified to see this language in S. 2309.

However, we do not think that the language goes far enough. Specifically, the concept of the applicant being a more equal party to the consultation procedure needs to be included in section 7(C) as well as in section 7(B). Our proposal to this effect appears on pages 5 and 6 of the written testimony. The WRC proposal, and the previous changes that you have made in section 7(B) do not, in our opinion, represent an industry veto of the consultation provisions as was suggested by witnesses on Monday.

Rather, we believe this this means all the principals in an application are involved in the process in reaching a solution which will be of benefit to the endangered species.

We are, after all, interested in the participation of all members in meeting the needs of such species.

The second of the issues I want to discuss with you today——

Senator CHAFEE. Just in summary, then Dr. Tate, is that satisfactory to you, what we have done on it——

Mr. TATE. What you have done is quite satisfactory to us.

Senator CHAFEE [continuing]. On the time schedule?

Mr. TATE. We would like to see it included in section 7(C) as well as in section 7(B), where you have it now.

Senator CHAFEE. All right. Proceed, please.

Mr. TATE. The critical habitat concept: We were disappointed to see that S. 2309 addresses the problem of listing critical habitat but does not deal with how the term "critical habitat" is defined. It is our opinion that the Fish and Wildlife Service is, in fact, failing to designate critical habitat. We believe that they are designating, instead, ranges or geographic areas in which the species would be most likely to occur. Designation of ranges continues to cause some problems for industry working in such areas. Some people have suggested to us that the Endangered Species Act definition of critical habitat already addresses this problem since the term is presently defined as the chemical, physical, and biological factors which allow an organism to survive and therefore our proposed amendments would be redundant. If this is correct, how can the members of the subcommittee assure through legislative history that the Fish and Wildlife Service uses the ESA definition when it designates critical habitat?

If such a solution is not possible through report language, then we continue to think that our proposed amendment would clarify the definition of critical habitat. The language we propose for section 3(5)(A) can be found on page 4 of our written testimony.

The third of our three issues that we would like to address today is experimental populations. In the oversight hearings in both the House and Senate——

Senator CHAFEE. Let me just say on that definition, I think we can do that in report language, as you suggested.

Mr. TATE. Thank you, Mr. Chairman.

Senator CHAFEE. All right, the last one?

Mr. TATE. The last one is experimental populations. That appears on pages 2 and 3 of our written testimony. In the oversight hearings in both the House and the Senate, there seemed to be agreements that individuals and populations of listed species are suitable for management and experimentation that would increase their populations and eventually allow them to be removed from the list.

There also seemed to be agreement that the present act did not provide flexibility to allow for such management and/or experimentation. We are pleased to see that S. 2309 contains amendments to allow for experimental populations, but we consider this a limited approach because it does not remove many of the barriers from management/experimentation. It seems to assume that the transportation of a species out of its current range and its release outside that range is the only experimental method. In fact, most biologists believe there are many ways of experimenting and managing species.

For example, the translocation of nests; hand rearing; vegetative reproduction of plants; food source manipulation, and so on. We suggest, on page 2 of our written testimony, a language substitution for section 3(7)(A) that broadens the concept of experimental populations to encourage creative solutions to the problems faced by endangered species.

Additionally, section 10(a)(2) does not satisfy our concerns that when an endangered species is introduced at the site of a proposed development that section 7 consultation might be invoked. We consider this concern may inhibit project developers from management/experimentation. We think the section 10(a)(2) language can be amended as proposed on page 3 to satisfy this concern.

In conclusion, we have identified three areas that we believe need revision. We have presented some alternatives that we believe will rectify this problem.

Thank you for the opportunity to work with you on this and to testify on needed changes in the Endangered Species Act. Thank you for your consideration of the views of the Western Regional Council.

Senator CHAFEE. Thank you, Dr. Tate.

You testified here in December and, unfortunately, just as you were going to testify, I was called away for some reason, but those that were here said that the testimony that you presented and the others with you that day was some of the best testimony that they had heard in a long time. They were greatly impressed by it.

We thank you for your constructive suggestion here and the thoughtful position that the Western Regional Council has taken in connection with this act.

I think we have taken care of two of the matters that you dealt with, with the consultation and the critical habitat. The experimental population. Let's take a look at the specific suggestion you have got there.

Mr. Roland Fischer from the Colorado River Water Conservation District?

We welcome you here.

STATEMENT OF ROLAND C. FISCHER

Mr. **Fischer**. Thank you, sir.

Thank you. We have submitted a written statement. We ask that it be included in the record. Our cover letter, Senator, addressed the point that, if we may, we would like to have the opportunity to supplement. The reason for that, largely, is the fact that I arrived from western Colorado late yesterday afternoon, and I would like to have that opportunity, if we may.

We had previously commented that we believed that there are arenas in which the act can be positively revised, and we would like to speak to that here today.

The Colorado River Water Conservation District is identified in the statement. Of course, our testimony today will emphasize the act as related to the water resources of the Colorado River Basin.

We believe at this time, there is a disproportionate bearing of the burden of the act, especially economic, in parts of western Colorado as opposed to the remainder of the Nation. We believe that the act should be and can be increased as to flexibility.

We would like to point out that there is no concern in Colorado; there is a concern in Utah; to some extent in Wyoming and in New Mexico about the act and its impact on a portion of the waters of the Colorado River between and among States.

I will be happy to enlarge on that. We would be happy to——

Senator **Chafee**. I think that would be helpful if you would enlarge on that.

Mr. **Fischer**. The specific example, at this point in time, we would like to address, involves the White River as between the States of Colorado and Utah. The Colorado compact of 1922, the upper Colorado River compact of 1948, as ratified by the U.S. Congress, addresses the apportionment of the rivers of the seven Colorado River Basin States in the first instance, and the four upper basin States in the second.

The Endangered Species Act and its mitigatory provisions as discussed by the Fish and Wildlife Service for the White River Dam in Utah and the Rangely River Reservoir at Taylor Draw in Colorado, are requesting the bypass of waters from both of those facilities where species are listed as endangered is a great concern to both States.

We are trying to negotiate with the Service to include language in the biological opinion and memorandum of understanding or the permits to the effect that the requests for waters to be bypassed from this facility shall not be an apportionment of waters between the two States.

We do believe that we have a problem as to the request for waters to be bypassed and whether or not there is a degree under the water law, especially in Colorado, in my case, for the utilization of that water and whether or not you have got a reserved right for an appropriated right and whether or not the waters would be administered within the context of State water law.

The White River, in particular, is not specifically mentioned in either of the two compacts, but we find the possibility that the demand for bypasses and, in one case, releases, could, in effect, be interpreted as an apportionment between the waters of the two States outside of the compacts as ratified by the Congress, and possibly in violation of State water law.

We are greatly concerned about it. The Colorado Water Conservation Board, which is the State water policy body, is concerned about it; and at this point in time, certainly the people of the western Rio Blanco County, who have voted to bond themselves to construct a reservoir, not only for domestic water supply, but to reduce the dangers of flooding due to high stream waters, certainly are concerned about it, having agreed to bond themselves to the extent of $13 million, which is a large amount of money for that relatively small population.

In this regard, we believe that there may be a disproportionate burden under the Endangered Species Act requirements on that small population in a relatively isolated part of the Colorado River Basin.

We have requested specific language to be included in the biological opinion and/or the memorandum of understanding or a section for permitting by the Corps of Engineers to address that specific issue.

We will be happy, Senator, to submit language addressng those points to the committee staff.

Further, concerning section 7, consultation, we believe that the applicants who are very often requested—indeed, demanded—to pay for associated biological analyses or opinion work should be part of the consultation process from the outset.

We have not had that opportunity in northwestern Colorado where specific projects are involved, and we believe that if possible, the section 7 language should permit the applicant to participate meaningfully in that consultation process.

We have found that very often the international data gathering process serves very little biological ends, but instead, winds up simply in project delay. Very often we find that the biologists have no end in sight for the gathering of data but very often gather data just for the gathering of data itself

Concerning experimental populations, we have made some suggestion on page 7 and 8 of our statement. We are concerned about experimental populations, and the Colorado Legislature is so concerned about it that in 1979 it passed a joint resolution speaking to the point.

We will be happy to submit copies of that joint resolution. The Colorado Legislature is further concerned and has a resolution working its way through the senate and house of the Colorado Legislature today on the issue of reauthorization of the act, speaking specifically to those issues which involved apportionment of waters and the, I believe, sine interstate compacts involving the waters of the Colorado which have been ratified by the U.S. Congress.

Further, we would like to comment that we have submitted specific requests and hopefully, constructive criticism, as to section 7, consultation and urge that the decision on the relative merits of a species that may be determined by the Secretary of the Interior to be endangered, that the final decision be made by the Federal Action Agency whose mandate is, in most cases, much broader than just that of the Department of the Interior; that is, for example, the Federal Energy Regulatory Commission must consider not only the National Environmental Policy Act, the Clean Water Act, the Colorado River Basin Control Act, and many, many other acts which are under the unbrella of environmental legislation.

We believe that the Action Agency is much better qualified to address those questions.

We have made suggestion in our statement. We urge, however, that if it is the sense of the subcommittee to go forward without consideration of some of our concerns that you actually reauthorize for 1 year only.

Senator CHAFEE. Why?

Mr. FISCHER. Because we think that there will be a greater sense of the ability to address these questions as opposed—we are urging flexibility—as opposed to routing what we view to be some of the inflexibilities into the statute a longer period of time; that a shorter period of time would be more in keeping with our ability to address the question.

Senator CHAFEE. Yes, but that is what we are here for now. Why go through this business every year?

Mr. FISCHER. Senator, my concern is this: That if we cannot—you may recall my caveat. If we cannot address these questions as to consultation, the Action Agency——

Senator CHAFEE. We can. That is what we are here for. We have hearings. We started this in December. This is the second day of hearings. There is no reason in the world why we cannot address these matters now. It may be it won't come down the way you want, but that doesn't mean that you have a better chance next year.

We just cannot go through these acts every year. We haven't got the time. We have got a whole host of measures to deal with, as you know.

Mr. FISCHER. Yes, sir.

Senator CHAFEE. I see nothing to be gained by doing this every year. If we want to address them, let's address them. See how it comes out. It may not come out your way. It may not come out my way. There is no point in coming back here all the time.

Mr. FISCHER. I believe that was my caveat, Senator. I tend to agree with that.

Senator CHAFEE. Suppose we came down your way? Then would you approve the 3-year reauthorization?

Mr. FISCHER. We certainly might, Senator.

Senator CHAFEE. That is what I suspected. You wouldn't want it back next year.

Mr. FISCHER. These trips are expensive.

Senator CHAFEE. All right. Put me down as unenthusiastic about that proposal.

Go ahead.

Mr. FISCHER. Senator, I believe that concludes my oral testimony. I believe that probably the time the committee has would be best utilized from here forward with the remainder of the witnesses and then questions and answers.

Senator CHAFEE. Let me just take up a point you made on the bottom of page 3 and the top of page 4.

You state that the Action Agency is in a better position than the Endangered Species Committee to weigh the potential benefits of a project vis-a-vis the need to preserve the species.

Mr. FISCHER. As related to other issues being considered; that is, the balancing, Senator. If my statement is not clear, I would be happy to——

Senator CHAFEE. I would. It seems to me that proposal guts the whole act. What you are proposing is to have the Action Agency, FERC, the Corps of Engineers, BLM, or whoever it is, render the decisions.

Mr. FISCHER. Yes, Senator; that is exactly it.

Senator CHAFEE. In other words, you would just as soon get rid of the whole act.

Mr. FISCHER. No, Senator, we are not saying that. What we are saying is that there are agencies that are better qualified than the committee to make a decision and to weigh and balance our experience from the standpoint of northwestern Colorado, where we believe—let me give you an example.

That the Fish and Wildlife Service, on the mitigation for three fishes listed as endangered, have requested each participant in the development of water resources for the benefit of the people of Colorado participate in a—I believe if the figure is $22 million—study whose objective is not clearly defined.

One county has been able to contribute $550,000. There is no accounting yet of how the money is to be spent. The Yampa Dam, we think, in the State of Utah, we think they will have a request for $2 million. It is approximately on the same ratio that the people of Western Rio Blanco County will be asked to contribute $300,000 to continue a program, to continue studies.

We believe that with a single mission decision process, that consideration is not given to the other beneficial users of the waters of the Colorado River Basin in this process, but that instead, the Action Agency, whose mandate is much broader, who must take into account all of the—if we can call them the environmental umbrella of legislation—are better in a position to take into account all of the benefits, including the economic benefits of the utilization of the waters of the Colorado River Basin.

We believe it is broader and not so narrow.

Senator CHAFEE. On page 5 you say:

In most cases, the Agency has neither sufficient technical expertise in fish and wildlife matters nor the financial resources necessary to hire outside consultants to perform the biological assessment.

Mr. **Fischer**. And the burden is put on the applicant.

Going back to my previous testimony, not attempting to beg the question, but to go back to my previous comment, the applicant, who is then asked to bear the economic burden, should be a participant in the consultation process up front, recognizing that the Fish and Wildlife Service has, in theory and in fact, more expertise in these arenas. But acting as a consultant, if you will, to the ACTION, Agency, the input should come from that side. Instead of duplicating biological expertise, you take into account biological, economic and other environmental questions.

Senator **Chafee**. Let's look on page 4:

As for the Endangered Species Committee, I think it is beyond dispute that the composition of the committee under the present Act is highly stacked in favor of species preservation at any cost.

Are you serious about that statement?

Mr. **Fischer**. Senator, will you direct me to the paragraph?

Senator **Chafee**. Your statement, page 4, the end of the first full paragraph.

Mr. **Fischer**. Yes, we believe that to be true.

Senator **Chafee**. Let's look at it. Let's look at who is on the committee. The Secretary of Agriculture; no one has ever accused him of being a wild-eyed conservationist?

The Secretary of the Army; what about him? The Presidential appointment from the affected State?

The Chairman of the Council of Economic Advisers? You said at any cost—the Secretary of Interior—endangers environmentalists?

There you go, there is your five votes right there, and the only suspect ones are the Administrator of EPA and the head of NOAA.

How can you make a statement like that?

Mr. **Fischer**. Senator, your experience is—or let me rephrase the question.

We do not have experience specifically going to the committee, but in having reviewed those—I cannot remember the number, but it is probably less than five——

Senator **Chafee**. I think it is three; isn't it?

Mr. **Fischer** [continuing]. Issues that came before that committee, Tellico Dam situation was probably the most celebrated. The U.S. Congress finally had to make a decision on that one. The Gray Rocks issue in the State of Colorado wound up with the apportionment of the South Platte River, out of Colorado into Nebraska for the benefit of a whooping crane.

In that instance, I believe that most all of us in the State of Colorado believe that was an example of preservation at "any cost."

Senator **Chafee**. It didn't come out the way you wanted it, but that doesn't mean that the decision was wrong. If you look at this committee, they have, on the Tellico one, I think the State representative voted against it, against the exception; isn't that right?

I don't know what you say about that; you say the Tellico was the most celebrated.

Mr. **Fischer**. Yes, it was.

Senator **Chafee**. It may have been the most celebrated, but it doesn't mean the decision of the committee was wrong. Frankly, I think everybody agrees that if we were starting that thing all over again, it wouldn't have been done. I have heard Senator Baker say that himself.

Mr. **Fischer**. That may be true, but nevertheless, the Congress made a decision contrary, if my memory is correct, to that of the committee.

We do believe——

Senator **Chafee**. That doesn't mean that was right, either.

Mr. **Fischer**. Senator, that is not our problem. The issue about the committee being stacked, we believe—we stand by our statement.

Senator **Chafee**. It is a pretty strong statement, that is all I say, particularly when you underline "any cost."

Mr. **Fischer**. Yes, sir. We believe the U.S. Supreme Court decision in the Tellico matter said exactly that, that is was the intent of Congress to protect——

Senator **Chafee**. That was before we even had a committee. That was before we changed the law.

Mr. **Fischer**. The committee was an attempt to speak, in my opinion, to the U.S. Supreme Court decision.

Senator **Chafee**. Let's go on with Mr. Parenteau. We will have a chance to get back to questions.

Mr. Parenteau?

STATEMENT OF PATRICK A. PARENTEAU

Mr. **Parenteau**. Thank you, Mr. Chairman.

Good morning, Senator Mitchell.

The National Wildlife Federation appreciates the opportunity to, once again, testify before this subcommittee. We are very pleased to see the moderate, thorough, and careful approach that this subcommittee has taken to the reauthorization of one of our most important wildlife conservation statutes.

In general, we like what we see in S. 2309. It seems to us that the subcommittee is striving, with the help of their able staff, to preserve the integrity of the statute and the basic framework, and we very much support that approach.

Having thrown a bouquet, I will turn it over and show a few of the thorns underlying the petals, because in at least three respects that I wish to talk about today, we think that the bill could be substantially improved. Bearing in mind the chairman's admonition to propose constructive changes that further strengthen the integrity of the act, that is my intent today.

I will leave for Michael Bean the testimony regarding improvements in the listing process. By not speaking to that, I do not mean to imply that the Federation is not very concerned about needed improvements in the listing process. However, for the sake of time and to avoid a duplication of effort, I will simply leave that to Mr. Bean.

I will focus on section 7 and the changes that are contained in S. 2309 and in three respects, I would like to propose what I hope are improvements.

One of these has to do with the consultation process; another has to do with the exemption process, and the third has to do with the exceptions on taking.

First of all, with regard to the consultation process, I think that as Mr. Tate testified this morning, and also Mr. Fischer, there is definitely a need for permit applicants to be involved in the consultation process.

Indeed, I think there is a need for greater public participation in some appropriate way in the consultation process.

To date, the process has been largely a closed process between the Wildlife Agency and the ACTION Agency, and I think that a great deal could be gained from opening it up in some ways.

I am not suggesting that it become a forum for the airing of every grievance or problem with regard to a particular project, but I do think that involving the applicant at an earlier stage and more meaningfully in the scope of consultation, the need for information and so forth, is a good idea.

The problem I have with the approach taken in S. 2309 is that it really doesn't get at what I think is the fundamental problem with the consultation process as presently cast, and that is, what happens within that short period of time, 90 days, unless mutually extended, when there is insufficient information to render a biological opinion?

The approach taken in S. 2309 is simply to make it clear that before a consultation can be extended in such circumstances, the permit applicant must also have to agree with it.

In my view, that further compounds an already difficult problem. The problem is this: The wildlife agencies are largely dependent, almost entirely dependent upon the action agencies and the permit applicants for the crucial information needed to render a biological opinion.

In most instances, the predicate for jeopardy is not so much the status of the species, but what is the project going to do to the biological requirements and the life systems that support these species. That has to do with such things as the emission levels from plants or water use for water projects, and so forth.

That information is peculiarly within the control and province of either the ACTION Agency or the permit applicant so that wildlife agencies really are not in a position to prepare themselves for consultation.

Indeed, the wildlife agencies don't even initiate consultation.

So by the time that the process is initiated and given the 90-day absolute time limit on the length of consultation, and given the fact that the wildlife agencies are not in a position to extend that consultation, they are at a very distinct disadvantage in preparing themselves to issue an opinion within the statutory timeframe.

So the problem is, what do you do when you don't know? It really doesn't help matters or help to resolve that problem by simply reallocating an impossible burden of proof. That seems to be what is happening, if not in intent, then in effect.

What we have now is a statute which practically forces the wildlife agencies to issue a no-jeopardy opinion when there is insufficient information at the close of the 90-day period. They cannot extend it, and as a result of the 1979 amendments, they are told they cannot issue a jeopardy opinion on the grounds that you cannot force the applicant to prove the impossible, that is, no jeopardy, when there is insufficient information to show it either way.

What we are doing now is shifting an impossible burden of proof from the ACTION Agency and the applicant, to the Wildlife Agency. The Wildlife Agency cannot prove jeopardy because there is insufficient information. The applicant cannot prove nonjeopardy because there is in sufficient information.

The problem is, what do you do to close those gaps?

Senator **Chafee**. Wait a minute. You have got 18 days for your biological assessment prior to your consultation.

Mr. **Parenteau**. That is true, Senator, I neglected that.

Senator **Chafee**. That is a tremendous factor. That is 6 months. To say that you have only 90 days really overlooks the 6 months you have already spent in the biological assessment.

Mr. **Parenteau**. Once again, the biological assessment is within the control of the ACTION Agency. When they present their information to the Wildlife Agency and ask for an opinion, there are cases, not very many, frankly, but there are cases where major projects are involved and important species are involved where the information supplied by the applicant or the ACTION Agency simply doesn't address what the biologists need, the critical information that they need to make a jeopardy opinion.

What I am talking about is the point at which the wildlife agencies are asked to render their opinion that the time period becomes all important, and even with 6 months lead time for the action agencies to be preparing information, even if the wildlife agencies were somehow actively involved in that, in scoping out what is really needed to render a biological opinion, you are still going to have cases where, unfortunately, 6 months and perhaps even 1 year is not enough to get the critical information.

Senator **Mitchell**. Are those, by your own testimony, going to be rare cases?

Mr. **Parenteau**. I think, Senator, the record shows the consultations are by and large completed within the 90 days; that is, they average around 75, so I think they are rare cases.

Senator **Mitchell**. Let me interject right here.

One of the problems in trying to write laws and regulations is to deal, not with the majority of cases that come before the governmental body of law, but trying to anticipate every conceivable occurrence and trying to regulate that.

It seems to me you always miss the point, and that is what has led to so much overregulation.

If I can take a related example, the truth-in-lending law passed several years ago, the Federal Reserve was writing regulations based on cases that were common throughout the country.

Instead of writing 5 pages of regulations dealing with those and leaving outside the regulations; and therefore perhaps unresolved, the isolated instances that may occur in some places, they wrote 100 pages of regulations covering every situation that could possibly occur and made the whole thing very difficult to administer.

Isn't that what you are asking us to do?

Mr. **Parenteau**. No, it is not.

Senator **Mitchell.** If we have something dealing here with the overwhelming majority of cases, isn't it best to keep it short and simple and accept the fact, that laws and regulations cannot govern every activity in which humans are involved and you are just going to have to try to keep it short and simple and manageable and thereby achieve more of what you want to achieve?

Mr. **Parenteau.** I acknowledge that point, Senator, and it is not—the recommendation I am going to make, I don't think, is going to complicate the process or overregulate it in the ways that the Senator is indicating.

Senator **Mitchell.** It is going to lengthen it, though, and length is the only complication.

Mr. **Parenteau.** It could. I think the critical question is whether or not activity that could go forward and still preserve the option of examining what the impacts of a project would be on a species are allowed to go forward as opposed to those activities which will foreclose alternatives at the expense of species' preservation which should not go forward.

The recommendations that I am making, I think, are a very sensible and middle-road approach to the problem. It is not trying to go all the way toward stopping and delaying indefinitely needed activities.

Senator **Mitchell.** We thought our bill was a sensible middle-of-the-road approach.

Everybody wants to be in the middle of the road.

Mr. **Parenteau.** That is true, and nobody knows where the road is leading sometimes, but in this case, I think the problem is that this is a loophole. We don't really know how many projects this type of problem is going to apply to.

In my experience, one of the most important ones, of course, has been with regard to oil and gas drilling in the Arctic and the critical lack of information on what impacts there will be on the most endangered of the great whales, the bowhead.

It seems from my experience in that situation that a great deal could have been allowed to proceed, but at the same time, the impetus for continuing and, indeed, completing studies for what the impacts of gas and oil drilling on the bowhead were, could also have been encouraged to proceed.

Unfortunately, that is not what has happened.

Three years ago, there was a proposal to complete a 3-year research study for the bowhead whale. The case, then, went to trial as to whether the lease sale itself was an irreversible commitment of resources.

The court ruled it was not. Since that ruling in the case, the critical research program has been seriously defunded.

In fact, the main research station in the Arctic has been closed. The studies are not complete. We are very—not very much further down the road than we were 3 years ago.

I think the reason for that is that the impetus for continuing studies, for continuing consultation was completely removed, and all of the activities are allowed to proceed and all of the commitments are allowed to be made and somewhere down the line, one of the three things is going to happen: Either the commitment of resources is going to be so tremendous and it is going to influence the biological opinion process itself; or it is not going to influence the opinion, and a negative opinion is going to be issued which frustrates the goal of oil and gas development; and, third, that is then going to be sent to the exemption committee which is going to have the difficult task of trying to decide whether or not to issue an exemption when enormous amounts of money have been spent and expectations have been raised.

The pressure to grant an exemption is tremendous and the bias toward granting an exemption is going to be significant. We think that kind of situation can be prevented by simply making it clear—which it is not clear now in the statutes—that the restrictions of section 7–D on the making of irreversible and alternative-foreclosing resource commitments apply and that only those activities meeting those two tests can go forward.

By the way, those are not easy tests to meet. The commitments have to be irreversible, and they have to foreclose alternatives that would conserve the species. That is a minimal kind of restriction in a situation where we are trying to gather information, but it is the kind of incentive—it creates the kind of incentive that is needed to complete studies to render a biological opinion on adequate information.

To not do that is to create the incentive for ignorance. What incentive does an action agency or an applicant have to find out what impacts their activities are going to have on species if at the end of the consultation period they can receive a no-jeopardy opinion and simply proceed?

There is no incentive. Ignorance is rewarded. In the case of the bowhead whale, that is precisely what has happened.

We are recommending—and the language we have suggested is by no means holy writ and there could be a different approach to this. But what we are trying to do is make it clear that the restrictions of section 7(d) apply in that limbo period where we are trying to complete studies to render an adequate biological opinion.

What the present situation does is, as I said, simply shift the burden of proving an impossible from one party to another.

Senator MITCHELL. But, of course, the contrary argument is that unless you have some determinable period, unless you have some concurrence, the incentive exists the other way; that it may be open-ended.

How do you create something that achieves both your objective and the objective of getting somewhere?

Mr. PARENTEAU. It seems to me that allowing some activities to go forward is a concession to not stopping progress on every project where this situation occurs, and the incentive is greater, in our situation, to complete studies in an expedited fashion than it is at present.

At present, what you have is a totally open ended process. The only thing that is happening is massive commitments are being made in the hope that ultimately, a favorable biological opinion will be issued.

That is important to keep in mind. What we are doing is encouraging people to do what was done in Tellico Dam, and that is keep building, keep committing and keep your fingers crossed that ultimately the biological opinion is going to say, "proceed." Because if the biological opinion does not say that, then you have got Tellico Dam all over.

Senator **Chafee**. The Tellico Dam, it doesn't seem to me is a fair illustration because the Tellico Dam had gotten to the point it had 90 percent completion before the problem was discovered.

It seems to me that in any case, people apply for a zoning exception or whatever it might be; they advance and make the investment if somebody wants to go ahead and build nonconforming buildings before they receive the zoning, permission to change, they do that at their risk and the whole building may have to be torn down.

So I am not quite sure. How can we keep people from proceeding to invest with the expectation that they will win when they might not win?

That is a risk everybody embarks on.

Mr. **Parenteau**. Two reactions to that: No. 1, what I think we are talking about is minimizing that risk in a responsible way.

Senator **Chafee**. How would you do it? What is your language?

Mr. **Parenteau**. The language would say that where insufficient information is available, basically, the Secretary is given the power to determine that an extension is needed for a reasonable period of time—that is the language we picked—to collect the information needed to render the biological opinion.

What that does is makes it clear that the consultation is continuing and section 7(d) applies.

Under the present wording of the statute, it is simply not clear what happens when the consultation period is "over", even though there is insufficient information to render a biological opinion.

It is not clear whether 7(d) continues to apply or does not. One court, the court in the Bowhead case, the lower court agreed with us it should continue to apply. Unfortunately for us, that case was overruled on appeal. There is a cloud, an uncertainty would continue to apply while this information is being gathered. I am trying to remove that uncertainty which is in everyone's interest.

Senator **Mitchell**. Let me ask you a question on that. You want to remove uncertainty; then you want to use something more explicit than the word "unreasonable", or something like that. The average extension for biological opinions in 1981 was 37 days. The average extension for no-jeopardy opinions was 42 days. What about a proposal that would require the concurrence of the applicant for any extension of over 60 days?

Senator **Chafee**. Anything less than that, for the applicants, the concurrence would not be needed?

Senator **Mitchell**. Would not be required; that is, the agency could extend it for 60 days, but anything over that would require the concurrence of the applicant.

If we are dealing with an already rare situation, it seems to me that this data, assuming its accuracy, we are now reducing it to an extremely rare situation.

Why not, in that circumstance, permit the applicant's concurrence to end the uncertainty?

Mr. **Parenteau**. I would like to think about that, Senator. I appreciate the spirit in which it is offered, and I will give it some thought. I guess I would still raise this question, though: In those situations where, frankly, it may take 1 or 2 or 3 years—3 years to do studies to really render a biological opinion. I guess I am not being very clear. The problem I am really trying to raise is that if you allow commitments to be made regardless of how long it takes to complete these studies, you are going to run into the problem of massive commitments having been made and either being frustrated by a negative biological opinion or having the biological opinion easily overriden in the exemption process because too much has been committed to the process.

Senator MITCHELL. What you are doing, again, is taking the one case, the extreme case, the longest case, and saying, "We have to write the law and the regulations to accommodate that case, and the 99 percent or the 90 percent of the ordinary cases will then, presumably, shift toward that end of the time spectrum."

What I am saying is that the problem in this country now and the reason people say "Get the Government off my back," and it is so popular to get up and criticize Government and regulations, is that for several years, for decades, we have had people writing regulations and passing laws intending to cover not the major areas of human conduct that the laws were designed to regulate, but trying to anticipate every conceivable example that could fall within the subject matter of the law and to accommodate that. That is what has created this problem.

Mr. PARENTEAU. What I am trying to do——

Senator MITCHELL. What it does is it undermines public support for the fundamental principle that the law is intended to implement, and it is contrary to the interests of those who support the principles behind the law, and this is a good example of that.

Mr. PARENTEAU. It seems to me we are in agreement on that point. What I am trying to do is design a narrow provision and a narrow legal requirement for the narrow case problem that we are talking about. I am not trying to rewrite the whole section 7 consultation process to fit this situation.

I am trying to say that in those situations where this does arise, the best approach is to allow some activity to go forward, but not the kind of activity that is going to foreclose an alternative in the event that the negative biological opinion is issued.

Maybe we haven't—as I said, perhaps our proposal is not the best way to get at this. What we are trying to do is write a narrow provisions to fit a narrow situation, which I think is going to become increasingly a problem. It certainly is going to become a problem with energy development where there are exploration and production phases.

It is almost inevitable that you cannot make a biological opinion in the exploration phase because you do not know where the ore or the oil is located, and the biologists will not be able to tell you what the impacts are going to be.

Yet the exploration phase amounts to an emormous commitment for a company.

So in all those areas for mineral exploration, it is a significant problem and one that I think the committee can address in a moderate way and in a narrow way and not rewrite the whole statute.

With that, I had better go on.

Two other points that I will make very quickly: One is with regard to the exemption process. As the subcommittee knows, we actually proposed an amendment to streamline the exemption process, not because we think the record indicates that it has been burdensome or a problem, but simply because we think that by rewriting it it will ease the anxiety of those who may wish to resort to the exemption process when it is necessary.

We generally agree with the approach taken in S. 2309 with the exemption process. We have one concern. That is with regard to the first level of the process which used to be the review board process. We very much agree with the subcommittee's proposal to eliminate the review board. We are somewhat concerned with the substitution of the Secretary for the review board. Our reasons for this concern are as follows:

We view this initial step as basically a factfinding process as proposed to a political or even a balancing process.

In this first phase of exemption, the job is to find out what the values of the species are; what the values of the project are, what the alternatives are; how significant the project is in terms of national interest, and so forth.

It is, in effect, a report card which is then forwarded to the exemption committee, which then has the difficult public policy task of weighing all of these various values and alternatives and making a decision on an exemption.

Our fear with the substitution, simply a substitution of the Secretary for the review board is that it be essentially of a factfinding nature and this process will be lost or even colored by political judgments. We would much prefer that the first step be either an administrative law judge or some similar type of official whose only job is to find facts; to report those facts to the committee and then to let the committee do the balancing and weighing based on the those facts.

So we are very concerned that the exemption process in this first step not become a substitute for the committee or in any way bias the outcome of the exemption decision.

The final thing I will mention has to do with the exception on taking when there has been a biological opinion or the identification of a reasonable and prudent alternative or an exemption granted.

We generally agree that a remedy is needed in the situation where a biological opinion, a favorable biological opinion has been issued, and the permit applicant is then still subject to the taking provision, section 9 of the statute. We acknowledge that that is a problem that needs to be fixed.

The problem with the existing fix, we think, is that it does not qualify the exception on taking in any fashion.

It is simply a blanket exception whenever there is a biological opinion which covers the activities within the scope of the action and the situation.

What we are recommeding—and I that we need to do some more work and thought on the exact language—but what we are recommending is that there be some type of qualification on the exception for those instances where a taking is easily avoidable.

If you can reroute a transmission line very easily, for example, and that would avoid taking an individual, we think that that still should be something that the act should require and not simply say that even if it is easy to avoid a taking because you have got a biological opinion, you can go ahead and take an individual species.

I think I had better conclude, and I thank the subcommittee once again for listening to our views on this subject.

We are committed to continuing to work with this subcommittee to reauthorize a strong Endangered Species Act. We very much appreciate the work of the chairman and the members of this subcommittee in working towards this end.

Senator CHAFEE. Fine; thank you, Mr. Parenteau.

Mr. Tucker, are you going to speak on behalf of you and Mr. Cagnetta?

Mr. TUCKER. Yes, sir.

Senator CHAFEE. Why don't you proceed?

STATEMENT OF W. SAMUEL TUCKER, JR.

Mr. TUCKER. Mr. Chairman, Senator Mitchell, I am Sam Tucker, director of the environment affairs for the Florida Power & Light Co.

With me today is John Cagnetta, vice president of Northeast Utilities.

We appreciate the opportunity to appear here today on behalf of the Edison Electric Instutute to discuss S. 2309, the Endangered Species Act Amendments of 1982. EEI is the National Association of Investor-Owned Electric Utility Co. We fully support the goals of the Endangered Species Act to protect and promote the recovery of endangered species.

We believe S. 2309 contains some excellent and necessary improvements in the act which will help achieve these goals. For example, section 7 of the bill responds to a problem identified by EEI and Northeast Utilities, one of our member companies, by exempting from section 9 those activities which a biological opinion finds are consistent with section 7.

We recommend a clarification of this provision of the bill to insure that the exemption from section 9 applies to all activities which an applicant or action agency has indentified at the time of consultation as part of the action being reviewed.

This clarification is important because the bill might be interpreted to apply the exemption only to specific aspects of the proposed actions which are indentified in the biological opinion.

Wildlife agencies generally have not in the past described in detail, in the biological opinion, all of the individual activities which an applicant identifies as part of the proposed action and which the wildlife agencies have considered before issuing the biological opinion.

It would be unnecessarily burdensome to require such extensive detail in future biological opinions.

Section 2 of S. 2309 recognizes the need to provide more flexibility in the treatment of experimental populations. Those aspects of the act with discourage private interests from supporting the introduction of experimental populations should be modified.

If these disincentives did not exist, private parties could support such experiments without concern about restrictions on their own activities.

The cumulative benefits of such increased private sector support of experiments to promote the recovery of endangered species will far outweigh any incremental risk of harm which might arise from elimination of these disincentives.

The treatment of an important disincentive, the prohibition of taking, requires further clarification. Senator Mitchell's statement accompanying the introduction of S. 2309 indicates that he, as one of the sponsors of the bill, intended to remove this disincentive for experimental population. The statement which the Assistant Secretary for Fish and Wildlife and Parks, Ray Arnette, submitted on Monday, April 19, indicates that the Fish and Wildlife Service intends to promulgate regulations to eliminate this disincentive for experimental population.

However, such regulations could be altered in the future. Therefore, in order to assure the long-term continuance of this approach, we recommend that the bill be modified to classify all nonessential experimental populations as species proposed to be listed under the act.

In addition, the scope of populations proposed to be included in the experimental classification is too narrow because of reliance on geographic separation as a criteria for approving an experimental population.

The bill would be more effective in promoting experimental activities if a broader definition of experimental populations were adopted.

Unless these problems are addressed, S. 2309 is not likely to stimulate enthusiastic private sector support of experiments to promote species recovery. It would be a shame to leave untapped the vast resources of the private sector which could be utilized to promote species recovery.

Section 4 of S. 2309 attempts to respond to the need for eliminating unnecessary delay by establishing maximum time periods for the various regulatory steps necessary in determining whether to list or delist a species.

We have long advocated that any decision to list or delist a species must be made expeditiously in fairness to all those whose activities will be affected directly by the decision.

As testimony on Monday, April 19, demonstrated, the effect of proposed section 4(b)(3) is not clear.

To eliminate potential confusion, we are proposing a definite time limit for issuing a notice of proposed rulemaking in response to a petition to list or delist a species.

With this change, a final decision must be made within 3 years of the receipt of such a petition.

Even if these changes are made, and despite our strong desire to avoid unnecessary delay, I must confess that we approach the time limits proposed in section 4 with some degree of skepticism.

In our experience, such time limits have had only a limited usefulness in expediting agency action.

Moreover, the proposed section 4(b)(2) of the bill, imposes significant burdens upon the wildlife agencies which may interfere with their ability to comply with the time limits established and significantly increase the uncertainties and delays imposed during the listing process.

The right to petition the Secretary to initiate a listing or delisting set forth in the proposed section 4(b)(3) of the act provides a more efficient alternative to the procedure in the proposed section 4(b)(2).

While the obligation to file a petition imposes a burden upon the petitioner, the burden is minimal. It should not deter those groups which believe that the Secretary can take an action to avoid the impending extinction of a species.

However, it should insure that reviews are not made regarding those species which obviously do not warrant review.

The modifications to the exemption process which are proposed in section 5 of S. 2309 will eliminate some of its cumbersome and lengthy procedures. While we continue to believe that it is far more appropriate to allow economic and social factors to be taken into account with the biological opinion by the action agency, the modifications now proposed go part way toward achieving that result by reducing the delays presently faced by applicants for an exemption based on these factors.

For these modifications to effectively reduce delay, however, a permit or license applicant should be able to appeal a negative opinion immediately after the completion of consultation. This would provide expert review of the biological opinion prior to the time of final agency action which would otherwise effectively be a foregone conclusion.

The amendment to section 7(g)(2)(a), which are proposed in section 5(b)(3) of the bill do not allow this procedure. Therefore, we are suggesting alternative language in appendix D to my prepared statement which clearly provides for this result.

Finally, section 6 of S. 2309 proposes to modify section 7(b) of the act to provide that a permit or a license applicant must concur in any decision to extend the 90-day time limit for the completion of the biological opinion. This provision properly recognizes the interests of an applicant in participating in any decision which would delay the ultimate decision on a project.

Mr. Chairman and Senator Mitchell, we would like to thank you for the opportunity to appear before you today. We will be glad to respond to any questions.

Senator CHAFEE. Thank you very much, Mr. Tucker.

Senator Mitchell, do you have any questions?

Senator MITCHELL. Mr. Tucker, I just want to ask you one question about your last comment on the extension. You have heard the testimony by Mr. Parenteau and our colloquy there.

I understand you prefer the provision now in the bill.

What would you think about the suggestion that I made in response to his criticism of that; that is, that there be permitted a single extension of up to 60 days, but that any extension beyond that require concurrence by the applicant?

Mr. TUCKER. Well, Senator, I think it is a step in the right direction, but frankly, I think that such a provision would have the practical effect of lengthening the time by 60 days.

Our experience is that agencies traditionally move at some predetermined speed, and that is why we are not—although we support time limits, we do not find that they always are effective. That is why we cannot be too enthusiastic about them. I am afraid that such a step, although in the right direction, would have such an effect.

Senator **Mitchell**. Assuming the accuracy of the figures that I have been given regarding the extensions in 1981, it would really have no dramatic effect, that is, in the absence of that specific time limit.

Extensions average 37 days for jeopardy opinions and 42 for nonjeopardy opinions, so a 60-day extension would not have any dramatic effect on that, would it?

Mr. **Tucker**. I would expect that they would then be averaging around 60 days.

Senator **Mitchell**. I see. It will be interesting to see what happens if we do. Thank you, Mr. Tucker.

Senator **Chafee**. Gentlemen, thank you very much.

Mr. Cagnetta, you have a statement which we will put into the record, too.

Mr. **Cagnetta**. Yes. Thank you.

Senator **Chafee**. Thank you very much, members of this panel. We appreciate your coming.

The next panel will be Mr. Carlton of the National Forest Products Association; Michael Bean from EDFS, Mr. Haggard of the American Mining Congress, and Kenneth Berlin of the National Audubon Society.

Why don't you come up, gentlemen.

STATEMENTS OF ROBERT CARLTON, NATIONAL FOREST PRODUCTS ASSOCIATION; MICHAEL BEAN, ENVIRONMENTAL DEFENSE FUND; JERRY L. HAGGARD, AMERICAN MINING CONGRESS; AND KENNETH BERLIN, NATIONAL AUDUBON SOCIETY

Senator **Chafee**. We will take your statements in that order. It is my hope to wind up here by 12:30, no later than 12:30. If you could summarize your statements, some of these are a little lengthy.

I think we know the issues pretty well. You don't have to give your backgrounds. We know the members pretty well, too, who are testifying.

So why don't you go to it.

Mr. Carlton?

Mr. **Carlton**. Thank you, Mr. Chairman. We appreciate this opportunity to give the subcommittee the views of the Forest Products Association on S. 2309. I do apologize for our printer making a mistake on the statement as distributed. The first 14 pages as submitted should have been at the end of the statement.

I apologize for that.

Senator **Chafee**. Should have been at the end?

Mr. **Carlton**. Yes. The part entitled "Suggested Additions to S. 2309."

Senator **Chafee**. I see. OK.

Mr. **Carlton**. As we have stated previously, we do support the concept that plants and animals should be protected from extinction as a result of the heedless acts of man. The Endangered Species Act was enacted in that direction. However, we believe the implementation of that act has tended to neglect or unnecessarily conflict with other important national goals.

We have reviewed S. 2309 and find that the bill does not address our concerns. In this statement and in the attachments to it, we are suggesting a number of amendments. Should the subcommittee decide it cannot accept amendments along these lines, we would prefer a simple 1-year reauthorization approach. The areas of particular concern to us are the definition and uses of terms in the act; the linkage between biological findings of fact and decision-making, and the cost and disincentives in the act which tend to inhibit the protection of species and their habitats.

Among the definitions with which we have had problems is that of "Critical Habitat." We would suggest that either the definition be reworded or that the report language accompanying the reauthorization legislation include language to insure that implementation of the act will be given the emphasis originally intended.

With respect to the term "species," we suggest that the term either be given its biological meaning or be dropped entirely. We would suggest that the terms "endangered species" and "threatened species" are the logical places to provide for the listing of subspecific taxa. I don't mean necessarily restricting it only to subspecies, but anything below the level of species.

The ability to list something less than the full species does provide the opportunity for flexibility if it is used properly. We don't believe that it is either necessary or wise always to list at the species level unless the entire species is endangered or threatened.

Listing below the specific level, however, should be restricted to two instances. One would be where failure to list species or subspecific taxa would result in listing of the species over its entire range. A second would be where a failure to list such a subspecific taxon would result in its extirpation; specifically, where such a subspecific taxon is isolated from other elements of its species.

Our concern is that at some point the Fish and Wildlife Service is going to be presented with a petition which it will honor which will have the effect of splitting a species into many small subspecific units. In such a case, relatively minor acts might affect one or more or the subunits.

This effect could be used to justify the listing of the subunits and perhaps cover the entire species.

Senator **Chafee**. Aren't you asking us to worry about something that has been in the act for nearly 8 years and you are taking a "supposing," and "if" situation?

Mr. **Carlton**. We feel we are facing a pretty big "if" when we are looking at the listing in the future of over 1,600 plants. This is where we foresee having significant problems.

Another definition where we have problems is that of "take." Congress saw two major causes for extinction. One was removal or reduction to possession of animals from the population. The second was the elimination of populations through modification or destruction of their habitats.

Congress decided that there should be two different ways of resolving this: One would be to prohibit, outright, the removal or reduction of animals from a population. The second was to authorize purchases of threatened habitats where such habitats would be modified or destroyed so as to adversely affect the species. We think the definition of "take" should be changed in insure that implementing agencies do hold to that concept.

In terms of the linking of biological findings of fact and decision-making, there is a great deal of overlap between what should be biological and the consideration of things other than biology. For example, the listing process includes not only biological findings of fact on a species' status and its habitat requirements, but it also involves economic and political considerations. That is because the economic analysis currently required during the evaluation of critical habitat and the application of such acts as the Regulatory Flexibility Act, the Paper Work Reduction Act, and Executive Order 12291, provide the only ways at the present time to balance the welfare of the species with other concerns before we enter the exemption process.

We agree with those who suggest there should be greater separation between biological findings of fact and what follows. To that end, we are suggesting changes in sections, 4, 7, 9, and 11. The effect would be to make the listing process nonregulatory in nature, based strictly on the biological facts of the species' status and its needs.

However, before permanent protective measures were taken, there would be a separate step for balancing of the welfare of the species with economic and other social concerns. This could be done by requiring the Secretary to design a protection plan through regulations which reflect a balancing of the needs of the species and other public programs. During the period of time between the listing of the species and the issuing of these final regulations or for up to 1 year after final listing, the species would receive complete protection to avoid actions that would affect the final protection scheme.

I think all of us are aware that there are costs involved in the protection of species and their habitats. Unfortunately, these are often overlooked. Some of these costs can be relatively easily quantified, such as opportunities foregone and direct outlays. However, there are other costs as well, such unconscious decisions not to take an action or to postpone or shift an action because of possible complications arising from the interactions with listed species or their habitats.

There is also the chilling effect, or the conscious decision to alter or fail to undertake activities because of possible problems.

Some of our companies also have costs because of their efforts to manage or to undertake activities that are favorable to listed species.

Our suggested additions include language that would provide for a system of compensating private individuals or companies for costs incurred while protecting species and habitats.

We would like to encourage debate on this point. We are open to other ways of resolving this particular cost problem than the one which we have offered.

In addition, we believe that our suggested changes in sections 4, 7, 9, and 11 would go far toward alleviating some of the disincentives by providing more options in the ways that species and their habitats can be protected.

We have no major objections to the various amendments that were included in S. 2309. But we do believe that the suggested changes we have offered will strengthen the bill. In addition, we suggest that the Congress provide for a study of implementation of the act by an objective third party organization. Because of the importance of the results of such a study and because of the number of suggested changes that have been offered to resolve the concerns of all of us here, the subcommittee may need more time to evaluate what should be done and to act on amendments such as those we have suggested. This is the reason we have recommended that the act simply be reauthorized for 1 year.

We appreciate this opportrunity to express our concerns and to give our suggestions to resolve the issues. We do offer our help in the subcommittee's efforts to improve the Endangered Species Act.

Senator **CHAFEE**. Thank you Mr. Carlton. There is no question that you have some substantial suggestions in connection with the act, mostly rewriting the whole thing.

Mr. **CARLTON**. We don't think it goes quite that far.

Senator **CHAFEE**. How about in your suggested additions, you recommend amending the condultations provision by deleting them entirely, is that truly your position?

Mr. **CARLTON**. What we have suggested is that some rather extensive rewriting is indicated; that sections 4, 7, 9, and 11, for the purpose of——

Senator **CHAFEE**. Everything but the title of the bill, apparently.

Mr. **CARLTON**. Not quite. However, what we were attempting to do with the language that we suggested is to make the listing process nonregulatory, then provide an opportunity for the Secretary to develop regulations which would address the specific factors that had resulted in a species having problems. During the time that he would be developing such regulations, we did provide rather complete protection by suggesting that the prohibitions in section 9 and the restrictive provisions of section 7 be moved into section 4(d) of the act itself. What follows thereafter would depend upon what the Secretary sees as necessary for the protection of the species as, perhaps, mediated by other demands, other social demands.

Senator **CHAFEE**. Let's go on to Mr. Bean.

STATEMENT OF MICHAEL BEAN

Mr. **BEAN**. Thank you, Mr. Chairman.

I am testifying this morning on behalf of 15 organizations identified in my written statement. That statement makes eight major points about your bill. I will summarize only the first point, which is our key concern.

At the December oversight hearings, I criticized the administration for having failed to list or propose to list even one new species under that act as of that time. Four months later, this administration has still not published its first new listing proposal. It did finally, however, in February, list its first new species, a listing proposed by the Carter administration.

The listing of that species, the only species thus far added to the endangered species list in the more than 15 months of this administration, reveals a great deal about what is wrong with the act today, and it reveals, as well, I believe, some of the shortcomings of your own bill, which I will describe. First let mel tell you something about the one species that the administration has now listed.

Senator CHAFEE. Why don't you restrict yourself to the act? We have been through the problems with the listing and not listing; failure to list by the administration. Does that help us with the act, though?

Mr. BEAN. I think that this example illustrates, quite well, why the act is not working well. The speices that has just been listed is one which the administration determined to be biologically endangered in January of 1981.

The Fish and Wildlife Service's Acting Director determined in January of 1981 that this species met the biological cirteria for endangerment. It was not listed, however, until February 1982, 13 months later. The only thing that the Fish and Wildlife Service did in those intervening 13 months was to analyze the expected economic impact of listing that species, a species that occurs only in the National Zoo and determine that the impact was so small that a full-blown regulatory impact analysis would not be required under Executive Order 12291.

It took 13 months, after determining that all biological criteria were met, to conclude that the economic impacts would not require an extensive full-blown economic analysis.

I think that reveals why the listing process has come virtually to a complete halt. On Monday, Mr. Arnett answered a question of Senator Gorton about the prospects for further listings soon by saying that 50 listing packages were "in the pipeline." What he didn't tell Senator Gorton, however, is that those 50 have been in the pipeline since at least last August. Nor did he tell you that for not even a single one of them has the administration determined whether a full-blown analysis under the Executive order will be required.

I think that illustrates the problem with the act, Senator, because it is clear that in the listing process, biological considerations no longer govern which species are limited. Indeed, economic considerations do.

Your bill tries to rectify that problem, but it does so, I think, in only a partial way. Your bill tries to open the door to the listing process slightly, but it is clear that your bill leaves the administration with the discretion to continue to bar passage through that door. Indeed, in his testimony Monday, I think Mr. Arnett, in effect, told you that he is going to continue to bar passage. Thus, he said, on page 9 of his written statement that although your bill requires that final listing determinations be based solely on biological criteria, the administration interprets your bill as allowing it to continue to comply with the Executive Order 12291 and applicable statutes in evaluating alternatives.

Mr. Arnett knows that the Executive order, by its very terms, requires the consideration of economic factors in rulemaking only to the extent permitted by law. Your bill, insofar as final listing decisions are concerned, requires that those decisions be based solely on biological criteria, thus rendering the Executive order inapplicable, it would seem.

Mr. Arnett must have had something else in mind. That something else, I submit, is the loophole that your bill creates with respect to proposals for listing. On that subject, your bill fails to maintain scrupulous adherence to biological criteria. You might have done that; you might have maintained that adherence by requiring that the Secretary propose a species for listing whenever he has substantial information that the species may be threatened or endangered.

Instead, however, you give the Secretary an escape. In your bill, even when he has substantial scientific information that a species may be threatened or endangered, he still has a discretion, and by the terms of your bill, unlimited discretion, never to propose it for listing. I think you can be sure that no species will not be proposed if its listing would impose more than a negligible economic cost.

Senator **Chafee**. Are you suggesting that he list when he has substantial information?

Mr. **Bean**. When he has substantial scientific information that a species may be threatened or endangered.

Senator **Chafee**. What does substantial mean? You might have a torrent of information but it might not be sufficient.

Mr. **Bean**. I will agree that it may be impossible to describe precisely the quantum of information that will be required.

I think, however, the term "substantial" will not introduce new uncertainty because it is, in fact, already in section 4(c)(2) of the act. What we are really trying to do is insure, through this requirement, that the Secretary's decision whether to go forward with a listing proposal be one governed solely by biological considerations.

At the present time, my concern is—and I think the record amply demonstrates this—that the decisions about whether to go forward with listing proposals are determined on the basis of factors other than biological factors. If we can tie the Secretary, in some way, to a requirement to propose a species for listing when some specied quantum of biological evidence is accumulated, then we can eliminate the discretion he now uses to stymie the listing process.

Senator **Chafee**. Move right along, if you can, Mr. Bean, because we have other witnesses.

Mr. **Bean**. Certainly. In addition to the requirement that the Secretary propose for listing any species for which he has substantial scientific information that it may be threatened or endangered, there are other measures that should be taken to insure that the listing process is biologically based. For example, that end can be facilitated either by removing economic considerations from the critical habitat designation process or by severing the listing process from the critical habitat designation process. Your bill does not do the former, and it only partially does the latter.

The way I think in which it does the latter, I think, is commendable. You have provided that the duty to designate critical habitat concurrent with listing is a duty that is imposed upon the Secretary only to the extent that critical habitat is determinable.

That should limit, somewhat, the Secretary's discretion to retrain from listing, using as an excuse his inability to carry out an economic analysis of critical habitat. Finally, I think you must hold the Secretary to a duty to make a final determination with respect to listing within a specified period after publishing a listing proposal. Your bill does that also, although with the changes we recommend, I think that period could be shortened, to a year, or a year and a half. I am sure with the changes we suggest to eliminate economics as a factor in the listing process, the Secretary can accomplish all listing actions within a shorter period than the 2 years you provide.

I will be happy to answer any questions you may have.

Senator **Chafee**. Thank you.

Mr. Haggard?

STATEMENT OF JERRY L. HAGGARD

Mr. **Haggard**. Thank you, Mr. Chairman.

My name is Jerry Haggard, presenting this testimony on behalf of the American Mining Congress. We will summarize our statement briefly, and we appreciate your attention being given to the full statement as it appears in the record.

As we address Senate bill S. 2309 specifically and also identify and suggest solutions to other additional problems, Senator, as you requested, which are being experienced and can be anticipated with the act, first we would like to emphasize that the American Mining Congress supports the efforts to protect truly endangered forms of life by reasonable means which also allow the fulfillment of other national goals.

For this reason, the American Mining Congress can support the purposes and policy as stated in the act to conserve endangered and threatened ecosystems.

However, while the policy in the first part of the act is of conservation and much of the act mandates absolute preservation, unfortunately, as is heard frequently, proponents of retaining the act as it is argue that this is necessary to prevent the extinction of species. The American Mining Congress does not oppose the use of the act to prevent the extinction of species, but we do oppose the misuse of the act to prevent the development of needed resources which does not even involve the risk of species' extinction.

We have attached to our statement a set of amendments which we urge be adopted. These amendments center around four areas: First, section 7 prohibitions and setting the exemption process, a listing of species.

Senator **Chafee**. Why don't you move right into them with your suggestions in each?

Mr. **Haggard**. Very well, Mr. Chairman.

The first group of amendments that we recommend are with respect to the section 7 provisions. When the act was passed in 1973, as you are aware, section 7 was a very short section involving only 13 lines that retained the most controversial provision of the statute. The section required and still does require that all Federal agencies shall insure that their actions do not jeopardize any endangered or threatened species or modify their habitat.

The literal inflexibility of this provision caused the courts to decide that no other objectives or other national policies could be carried out if the action would jeopardize a species or adversely modify its habitat.

As a result of this——

Senator CHAFEE. Why don't we get right to your recommendations, because we are familiar with that, with what has gone on in the past. What do you suggest?

Mr. HAGGARD. With respect to section 7, I will address some of the proponent's positions of why section 7 has not created a problem and that is, that not many developments have been stopped by the process. The reason that not many developments have not been stopped is obvious when one considers that the process involves four levels of reviewing, ending with a board of seven Presidential Cabinet members who may approve an exemption by not less than a 5-to-2 vote.

In our calculation, we figure that even for the steps involving time limits, this process for the exemption amounts to 810 days or more than 2 years. This does not include the time that will be taken by the six other steps in the process that have no time limits and, in addition to that, there are at least three opportunities for court suits in the process.

The only two developments, as you are aware, that completed the process are the Tellico and Grayrocks Dams, and those were required to do so by statute, which also placed a time limit on the process. The nature, we would like to emphasize, of those two projects which did have to follow the exemption process is very significant.

Most planned developments allow alternatives in their site locations and can avoid the exemption process simply by choosing another site.

Senator CHAFEE. Isn't that what we are trying to achieve here?

Mr. HAGGARD. That is one alterative that is available to most land users, but I would like to emphasize, as a comparison with the Tellico and Grayrocks Dam, they were fixed in the location because they were largely completed.

A mining development, and the necessary mine site facilities is in a very similar case; they are locked into one land situation.

The site cannot be moved. Therefore, if a major mining company, already having expended several hundred million in a development were faced with the exemption process, even assuming that they complete the process, what could be produced in the end; the lack of production could be disastrous to the company.

The additional difficulty with section 7 is that it places every activity which might result in only a slight modification in a significant part of the natural habitat in the same posture as if the action would certainly exterminate a species.

Therefore, two basic changes that we feel are necessary for section 7 is first to apply a standard of significance to the harm which might be caused to a species or its habitat before entering the exemption process is imposed; and second, to streamline the process once it is imposed by allowing the agency responsible for the action, with the assistance of the Fish and Wildlife Service, to exercise its own judgment in determining and mitigating any adverse effects its action may have on a species.

If the existing exemption process is to be retained in any of its present form, we believe it should be limited to those severe cases in which there is a truly serious likelihood that a proposed action could risk extinction of a species.

A second area of recommendations is in the listing process. The present statute provides that a species may be termed endangered or threatened by considering only a part of its range rather than considering its total endangerment overall of its range. This allows a species to be listed as endangered or threatened in some geographic areas even though it may be abundant in others.

An example of this given in our statement is the grizzly bear, listed as threatened in the 48 contiguous States and is unprotected in Canada and Alaska, and even hunting is allowed. The goal should be to prevent extinction or endangerment of extinction of species and not to allow the similar severe restrictions which conflict with other national needs to fringe areas where the species population is adequate in other areas.

The third area in which we have recommended revisions is in the area of designating natural habitat. Prior to the 1978 amendments, testimony revealed that the public notice system for proposed listings of species was not effective because critical habitats for those species were not disclosed to allow the local public to know whether the listing would impact their area.

The 1978 amendments and the committee and conference reports for those amendments clearly directed that the Secretary will, in most cases, give public notice of the critical habitat decision made at the time a species is listed, but instead, the practice has been, in most cases, that the critical habitats are not revealed.

Senate bill 2309, unfortunately, would prepetuate the problem. The amendments we propose would correct the problem.

The fourth area that we have addressed is the species recovery and translocation programs in S. 2309. The American Mining Congress does favor such a program, but there are legitimate concerns that translocations of species will result in the creation of additional critical habitats and restrictions on resource uses.

Unfortuntely, 2309 would allow this to occur.

Also, the Senate bill has no provisions for notifying local residents and governments of proposed creation of experimental populations in their areas. We believe that standards should be included which would guide the translocation of such species to areas in which interference with other activities would be unlikely.

That concludes our summary of our statement, Mr. Chairman. We thank you for your attention and for the opportunity to present this statement.

Senator CHAFEE. Thank you very much, Mr. Haggard. The four points you made are helpful to us.

I am not quite sure what "significantly jeopardize" means. I am just not sure that that changes things much. We have got jeopardize. Now if one is in jeopardy, one is in jeopardy. I don't know how you can be significantly in jeopardy.

Mr. HAGGARD. It certainly means more than a mere jeopardization—under some cases.

Senator **Chafee**. Would you care to expand on this subject? I suspect jeopardy means you are threatened; you are endangered; in imminent danger.

Mr. **Haggard**. As one example of that, Mr. Chairman, there are instances in which, for example, an activity may occur in the area of a listed species, and even though the species may not have been seen in the area, there have been instances where it can be argued that there is some slight jeopardy. Therefore, without the modifier, the activity could be stopped unless there is some higher standard to the degree of jeopardy that could be caused.

Senator **Chafee**. I won't beat it around here. If habitiat is critical, it is critical. I don't see how there can be a lesser degree than critical habitat, for example.

I like the way you present your testimony. You had your four points, and you addressed each of them, and that is helpful to us.

Senator Mitchell?

Senator **Mitchell**. I have no questions, Mr. Chairman.

Senator **Chafee**. Mr. Berlin?

STATEMENT OF KENNETH BERLIN

Mr. **Berlin**. Thank you, Mr. Chairman.

It is a pleasure to be here as the last witness at the end of this 4-month process of reviewing the workings of the Endangered Species Act. I will try and keep my testimony short. I would like to basically discuss a number of areas, both in your bill and in response to the testimony that you just heard.

During the testimony that has been given by the environmental community, I think we have emphasized three themes throughout: The first of those themes is that the act has worked extremely well; that there is no justification at all for making any changes to the substance of section 7 and section 9.

When we began this testimony on December 8, we pointed out that there were 10,000 consultations, almost, in the last 3 years, and that none of those have stopped projects. Since that time, those figures have been updated but the result remains the same.

At the same time——

Senator **Chafee**. I would like to ask Mr. Haggard about that. Mr. Haggard, you were saying people don't do this because of the chilling effect; they are scared off; it takes so long, but there Mr. Berlin has statistics that show that people do go up through the consulting process.

What do you say about that?

Mr. **Haggard**. Well, there have been instances of the consulting process being followed, but the instance in which a major and, in our instance, our area of concern, a major mine development has been stopped, has not occurred yet.

We nevertheless think that that is not reason not to amend the statute.

Senator **Chafee**. Your case would be much stronger, Mr. Haggard, if you came here and you had exhausted your remedies. You said that "we have tried, and this is an example," but indeed you have not. You can't cite a case where you have stopped, can you?

Mr. **Haggard**. There has not been——

Senator **Chafee**. Or where there haven't been other factors? It is very hard for us to take a hypothetical case when this act has been on the books since 1973, and people haven't gone the full route, but you are saying there is a chilling effect and that it discourages mining and so forth.

Mr. **Haggard**. Mr. Chairman, if I may observe, I truly believe that it is the responsibility of the Congress to anticipate what is clearly a problem that can be seen from reading section 7, and you might compare that to a broken lighthouse in a ship harbor. You should not wait until a ship sinks to fix the lighthouse. It is clear that it presents a substantial risk.

Senator **Chafee**. Mr. Haggard, we have the act because there is a substantial risk that these species are being rendered extinct. We have had all kinds of testimony of the rapid disappearance of a whole host of species in the world and in the United States.

The act is there for a purpose. It is not something that we just conjured up out of thin air to impose difficulties on those who wish to develop lands. Now you are coming in and saying, "we should change it because it presents problems," but you haven't shown that you have gone the limit of your remedies.

Mr. **Haggard**. That is because it has not occurred, but it is clearly of a substantial and enough of a serious threat that it will. When that does occur, the ramifications, disasterous ramifications to a particular company are serious enough that we believe that it should be prevented by an amendment of section 7.

Senator **Chafee**. Mr. Berlin, why don't you proceed?

Mr. **Berlin**. Mr. Chairman, when that occurs, and as I said, we have 10,000 examples in the last 3 years where it did not occur, and probably 40 or 50,000 examples since 1973 where it did not occur, of course, any company that is thus affected can go for an exemption. The exemption process, as stated in your bill, would take 200 days from the department's decision that the project would, in fact, jeopardize the survival of a species.

We think that section 7 is efficient, given the history of the act and the overwhelming evidence that conflicts between species and projects can be avoided. There is absolutely no justification at this point in time for any sort of amendment.

That particularly becomes true with regret to adding words like "significant" to the word "jeopardy." Again, there is not the slightest evidence that there has been any problem with the current standard. Why add something now and start changing around the whole law and creating a whole new spectrum of uncertainty when that, in fact, is not necessary?

Senator **Mitchell**. Do you believe in the old saying that if it ain't broke, don't fix it?

Mr. **Berlin**. We certainly do in this case.

I would like to turn to two other points. Senator Mitchell, you mentioned before the extension of the consultation, putting a time limit of 60 days on the extension. The amendment we proposed to your bill would provide that the secretary, in consultation with the permit applicant, can extend the consultation, and at the time of extension, before the end of the 90-day period, he must specify how long that extension will be and what data must be gathered during that extension.

Senator MITCHELL. Would you permit multiple extensions or just one?

Mr. BERLIN. I think we would require them to scope out with the permit applicant how long that extension would be, and that would be the extension. We don't give the permit applicant a veto. Again, the only disagreement I have with your 60-day veto is not that it is not a reasonable idea; it's just that I don't see the need for it yet, and again being conservative, I don't see a reason to go ahead.

However, if you see a need. You could write in the statute that if it is going to take more than 60 or 90 days, then the permit applicant has to approve of it.

Senator MITCHELL. Not to persue it any longer, but you have kind of turned it around. Were you here when Mr. Parenteau testified and we had that discussion?

Mr. BERLIN. Yes.

Senator MITCHELL. It is clear that the number of cases which require longer than that are very few and rare cases. Why write the law in a way to accommodate the extremely rare case when what it ought to be designed to do is to provide a meaningful timetable for the overwhelming majority of cases?

Mr. BERLIN. That is what I think we try to do in our amendment. We said a permit applicant can sit down with Fish and Wildlife Service and the action agency can sit down with the permit applicant to scope out the delay time period. Let the permit applicant know how long the delay will be. It is part of effort the environmental community to give business certainty in its decisionmaking. We think that is more important to the business community than anything else we could do for them.

The key thing is for business to know how long something will take. If it 90 days, it doesn't matter if you know that so long as you know it far enough in advance.

Senator MITCHELL. That is true, but they would like to have a say in the process, the applicant, which goes beyond consultation with the action agency. That is, if it is going to be extended, it requires their concurrence beyond some point.

Mr. BERLIN. Again, I have no theoretical problem with that. We are letting them get involved in the term of the extension and gathering the data relating to the length of that extension.

The other major point I would like to address is the relationship between section 7 and 9 of the act. Mr. Parenteau spoke about it briefly.

In your legislation, you state that as soon as the consultation is finished, a person receives an exemption under section 9. We propose a slightly different amendment, one that we think will both help industry and help the species involved. We are concerned that if your bill is accepted, a person can go ahead after receiving a no-jeopardy opinion and essentially, with impunity, adversely affect the species in the area of the project.

For example, suppose the Service has found that you can go ahead and build a road near a bald eagle's nest under your amendment, someone can go in and cut the tree down and kill the young eagles. There is nothing anybody can do about that.

We propose a slightly different approach. That is, that the permit applicant or an action agency can request of the Secretary, and if so requested the Secretary must attach to the biological opinion, within 30 days of the request, a list of the measures that must be taken to minimize the taking of the species involved. Then, assuming those measures are complied with, a person receives an exemption from section 9.

Senator MITCHELL. Mr. Haggard, having just argued for unlimited extension in other areas, are you arguing for a 30-day limitation in this area?

Mr. BERLIN. No, because I think the biological opinions require enough similar considerations so that the Fish and Wildlife Service do this type of analysis in the 30-day time period we talked about. Very often, biological opinions do contain the data we are talking about. For example, they list those steps which must be taken to minimize harm. The cases will be rare where a permit applicant specifically requests that they do so. We think that the opinion should include that. Then the permit applicant can then go ahead and proceed with his project without any fear at all of violating section 9.

Even more than your bill, this gives certainty to the permit applicant. Of course, it will specify exactly what he can and can't do. Therefore, we think there are benefits in the process.

That basically finishes my testimony. Throughout this process the environmental community has been trying to emphasize that the act works well. Second, even though that is the case, we support all measures to improve the efficiency of the act. We want some measure to improve the efficiency from our standpoint; some like improving the speed of the exemption process will obviously help industry.

The third is that we think that in improving the efficiency of the act, we should minimize the certainty of the business community and thus clarify the responsibilities that they have under the act and the time limits that they have to deal with.

Thank you.

Senator CHAFEE. I would like to ask you and Mr. Bean a question, Mr. Berlin.

As I understand your testimony, and Mr. Bean's, the principal problem you had was you get the permission under section 7; that affects the taking under section 9; and you find that there are now limitations on what you can do under section 9 as a result of the approval under section 7; am I correct?

Mr. BERLIN. Yes. We think there is a potential conflict between section 7 and section 9. We don't oppose some sort of an amendment.

Senator CHAFEE. There is no question; we have had all sorts of testimony under that, that you get approval under section 7, but then you cannot approve because of section 9.

Mr. BERLIN. Our concern is that we think you should, nevertheless, attempt to minimize the taking of any endangered species, even if I won't jeopardize their survival.

Senator CHAFEE. What would you have us do?

Mr. BERLIN. Essentially what our proposal is is that:

> At the request of a permit or license applicant of a Federal agency, the Secretary will attach to his biological opinion within 30 days of the receipt of that request, a

section that basically says that you have to do the following things, reasonable things, in order to minimize the taking of the species.

With that attached to the section 7 biological opinion, the permit or license applicant can go ahead and do anything consistent with that opinion.

Senator **Chafee**. By the very nature to that, it would be broad and fuzzy.

Mr. **Berlin**. Not necessarily. Take the bald eagle, example. The Fish and Wildlife Service would say, "Don't cut down any nesting trees from February to April. If you have to cut it down, cut it down in November when there are no birds there. Presumably, the birds will go somewhere else." If you look through biological opinions, you will find there are often such measures designated.

One I dealt with in the Department of Justice involved a bombing range in Puerto Rico. There, the biological opinion said, "What you try to do is you try to take certain steps to avoid overshooting the targets, you conduct military maneuvers in 10 months of the year rather than 12 months." They were reasonable steps. They would not make a project unprofitable.

Senator **Chafee**. That was your principal point, too, Mr. Bean, wasn't it?

Mr. **Bean**. That was one of our major concerns. Our principal concern, however, is with the listing process.

Senator **Chafee**. Oh, the failure.

Mr. Cagnetta, what are your thoughts on this?

Mr. **Cagnetta**. What is being spoken to, I think, is provided for under the regulations. In fact, the example just given, it shows that measures are defined in the biological opinion or can be defined.

In fact, in all the licensing processes that I have been involved with energy facilities, the biological opinion of the agency does involve specific environmental constraints; programs, monitoring programs; surveillance programs; so I believe it is well within the Secretary's right today, within the framework of the current regulations and section 7, to define the constraints of the activity.

Senator **Chafee**. Under section 9?

Mr. **Cagnetta**. Under section 7.

Senator **Chafee**. He is discussing the taking, though.

Mr. **Cagnetta**. Yes, and the exemption under section 7(O).

Senator **Chafee**. What do you say to that, Mr. Berlin?

Mr. **Berlin**. There is no question that the Secretary can now include the type of measures we are talking about. But since we are now saying let's give somebody a specific exemption, we are just saying let's require that those measures be included. They are not always included.

It would certainly not create a problem for the utilities industry in the type of problem Mr. Cagnetta mentioned. They are, of course, trying to do everything they can to minimize the taking.

I think the problem Northeast Utilities faced was not that it was not making every reasonable effort to avoid taking, but that there was no way to avoid a few eggs taken as a result of the project. Everybody agreed that that should not stop the project.

Senator **Chafee**. What do you say to that, Mr. Haggard?

Mr. **Haggard**. We believe section 9 should be amended because—and I agree generally with Mr. Berlin; that the exemption, whether it is by the Action Agency or whatever entity, the proviso should include both an exemption from section 7 and a means by which taking under the definition in section 9 would be mitigated.

Senator **Chafee**. Mr. Carlton?

Mr. **Carlton**. We would certainly agree there is a need to resolve this conflict between sections 7 and 9. We do feel that the language in the act currently does allow the Secretary to include in his opinion those measures which he may believe are necessary to prevent unnecessary taking.

I would think it would be within the purview of the subcommittee to include in its report language directing him to do this.

Senator **Chafee**. What do you think, Mr. Haggard, of the 30-day provision in there? Is that one more delay?

Mr. **Haggard**. That is one part of your bill, Mr. Chairman, that we do agree with; that extensions in the process would have to be agreed to by the applicant, but as the gentleman mentioned earlier, as the case is now, they are not actual limits. The applicant has no opportunity to stop extensions.

So if those extensions are extended from 30 days to 60 days, unfortunately, we think it would turn out to be that it would actually come up to be a 60-day period.

Senator **Chafee**. OK, gentlemen. That concludes it. There are some questions that Senator Gorton has for members of this panel and perhaps for members of the prior panel.

I see Mr. Fischer and others here; Dr. Tate. We would appreciate it if you could respond to Senator Gorton's questions as rapidly as possible. He will get them out to you.

Get them in as soon as you can. That would be very helpful. Just send them back to the Committee.

Thank you, very much.

Whereupon, at 12:30 p.m., the subcommittee recessed, to reconvene at the call of the Chair.]

[Statements submitted for the record follow:]

STATEMENT OF

JAMES TATE, JR., PH.D., VICE CHAIRMAN

ENDANGERED SPECIES AD HOC COMMITTEE

WESTERN REGIONAL COUNCIL

BEFORE THE

SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

HEARINGS ON

S.2309

THE ENDANGERED SPECIES ACT AMENDMENT OF 1982

WASHINGTON, D.C.

APRIL 22, 1982

Chairman Chafee and Members of the Subcommittee:

On behalf of the Western Regional Council, I would like to thank the Subcommittee for the opportunity to testify on an issue of great importance to the Intermountain West -- the Endangered Species Act.

I am Dr. James Tate, Jr., Principal Environmental Coordinator for ARCO Coal Company and Vice Chairman of the Western Regional Council's Endangered Species ad hoc Committee. I have been a coordinator on environmental matters for Atlantic Richfield Company since 1973. Prior to that time, I was an associate professor at Cornell University and Assistant Director at Cornell's Laboratory of Ornithology. I have worked for the National Audubon Society and served in advisory roles to the Nature Conservancy and other conservation organizations.

The Western Regional Council was organized to provide a unified voice for the business community in the Intermountain West. It is composed of the chief executive officers of corporations in the states of Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah and Wyoming. Major financial, utility, manufacturing, mining, and other industrial enterprises are represented on the Council. The Council works to establish balanced policies which consider the benefits of both economic development and environmental protection and provides a forum for the resolution of business problems on a regional basis.

The WRC thinks that as a western regional organization of business entities it may be uniquely qualified to discuss the Endangered Species Act since the Act is, in many respects a "western issue". Of the 133 endangered or threatened animals currently listed as having historic ranges in the U.S.A., 71 species, or 53%, are found only west of the Mississippi River. Of the 60 plants listed, 80% are found west of the Mississippi. Overall 61% of the listed U.S. species are found in the West. These statistics, especially when considered in conjunction with the vast federal land ownership throughout the West and the concomitant federal actions invoking the ESA, clearly indicate that endangered species problems are of great concern to the Western states.

In prior testimony before this Subcommittee, the WRC identified three areas in ESA which it wanted the Subcommittee to address:

--the need for provisions in the Act to allow and encourage the application of experimental management techniques to endangered species;

--the need to clarify the definition of critical habitat; and

--the need for provisions which will remove the delay and uncertainty caused by the current Section 7 consultation process.

The WRC was happy to see that S. 2309 has addressed two of the WRC's concerns, specifically the need for experimental population provisions and the need to remove the delay and uncertainty inherent in the existing Section 7 consultation process. The WRC would like to address each of these three issues in the context of S. 2309.

Experimental Populations

In ESA oversight hearings in both the House and Senate, there seemed to be general agreement that individuals and populations of listed species are in many cases eminently suitable for manipulation and experimentation which may increase their populations and eventually allow the species removal from the list. There also seems to be agreement that the present Act does not have sufficient flexibility to allow for manipulation and/or experimentation.

The WRC is, of course, happy to see that S. 2309 contains amendments to allow for experimental populations. However, the amendment contained in S. 2309 is, in the WRC's opinion, a very limiting approach and does not, in fact, remove many of the barriers to manipulation and experimentation. Firstly, the proposed language of Section 3 (7)(A) seems to assume that the transportation of a species out of its current range and its release outside of that range is the only available experimental method. In fact, there are many other ways of experimentation and manipulation; for instance, the translocation of nests, hand rearing, vegetative reproduction, food source manipulation, etc.

The WRC suggests the following language substitution for Section 3 (7)(A):

(A) Any person authorized by the Secretary has transported and released ourside of the current range of the species to further its conservation pursuant to the Act; and

strike
out &
replace
with

(A) Any person authorized by the Secretary has manipulated or experimented with in order to enhance its population or survival; or

Secondly, Section 10 (a)(2), as it is now proposed, does not satisfy the WRC's concern that when an endangered species is introduced at the site of a proposed development the Section 7 consultation may be invoked. The WRC considers that this concern presently inhibits project developers from manipulation and experimentation. The language in S. 2309 does not ameliorate this conern.

However, we think the Section 10 (a)(2) proposed language can be amended to satisfy this concern. The WRC substitution would read as follows:

(2) Any experimental population shall be treated as a threatened species, and, as provided in Section 4(d), the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species; Provided, however, That if the Secretary determines, on the basis of the best available biological information, that an experimental population, other than an experimental population occurring on a National Wildlife Refuge, is not essential to the continued existence of an endangered or threatened species, he shall by regulation, specify [that, solely for the purposes of subsections 7(a)(2), 7(a)(3) and 7(c), such experimental population shall be treated as a species proposed to be listed under Section 4.] Provided, further, That no critical habitat shall be designated for such nonessential populations.

strike
out &
replace
with

through a written agreement with the person proposing to manipulate the experimental population that Section 7(a)(2), 7(a)(3), and 7(c) shall not apply.

The Critical Habitat Concept

The WRC was disappointed to see that S. 2309 addresses the problems of listing and critical habitat but does not deal with how the term "critical habitat" is defined. It is the WRC's opinion that no one in the oversight hearings has argued with the WRC allegation that the Fish and Wildlife Service is, in fact, failing to designate "critical habitat" and is, instead, identifying "ranges" (geographic areas in which the species might be likely to occur). The designation of ranges continues to cause problems for industry working in such areas. Some persons have suggested that the present ESA definition of "critical habitat" already addresses this problem since the term is presently defined as the physical, chemical, and biological factors which allow an organism to survive; and, therefore, the WRC's proposed amendments would be redundant. If this is correct, how can this Subcommittee assure that the Fish and Wildlife Service uses the ESA definition when it designates critical habitat? The WRC would like for the Subcommittee members present today to address themselves to how the U.S. Fish and Wildlife Service can be directed or encouraged to implement the proper definition of critical habitat as stated in the Endangered Species Act.

The WRC continues to think that its proposed amendment would clarify the definition of "critical habitat" and that such clarification would ameliorate the problem. We encourage you to once again consider the WRC's proposed amendment:

Section 3(5)(A) is amended to read as follows:

> (A) The term 'critical habitat' for a threatened or endangered species means (i) the specific areas within the geographic areas, occupied by the species which contain the physical, chemical and biological elements necessary for survival and propogation of the species at the time of listing ~~at the time it is listed in accordance with the provisions of Section 4 of this Act, on which are found those physical or biological features~~ (I) designated by the Secretary in accordance with the provisions of Section 4 of this Act, to be essential to the conservation of the species and (II) which may require special management consideration or protection; and (ii) specific areas outside the ~~geographic area occupied by the species~~ critical habitat which are designated at the time it is listed in accordance with the provisions of Section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

Section 7 Consultation Process

The consultation process, as it is now written, is not clearly defined and is certainly not explicit. This lack of definition can cause project delay but, more importantly, it causes uncertainty. A company, waiting for a permit or license from a federal agency, is always uncertain as to how long the "Consultation Process" will take, what the delays and final decision will cost the company in money and time, and when, if ever, the company will complete its responsibilities under the Endangered Spcies Act. The present consultation process is written in such a way that it can easily be used by federal agencies to intimidate companies into accepting unreasonable delays (and their resulting costs) by threatening jeopardy opinions.

The WRC, in earlier hearings, proposed amendments to the consultation process which it felt would remove the delay and uncertainty inherent in the process. Although S. 2309 does not include the proposed WRC consultation process, it does include amendment language which addresses the delay and uncertainty inherent in the present process. The WRC is most gratified to see this issue addressed in S. 2309. However, the WRC does not think the language in S. 2309 goes far enough on this subject. Specifically, the concept of the applicant being a more equal party to the consultation procedure needs to be pervasive throughout Section 7 and not just included in Section 7 (b). Additionally, the alternative of mitigation measures should be explicitly stated. The WRC proposed language would read as follows:

> Section 7(a) FEDERAL AGENCY ACTIONS AND CONSULTATIONS.
> (1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to Section 4 of this Act.
>
> (2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action') is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall consult with the applicant, if any, shall use the best scientific and commercial data available, and shall consider as an alternative to the finding of "jeopardy" the possibility of mitigation and enhancement measures, including, but not limited to research, habitat acquisition and maintenance propagation, or transplantation, to reasonably minimize the adverse effects of the agency action upon the species or critical habitat concerned.

(3) Each Federal agency shall confer with the Secretary and the applicant, if any, on any agency action which is likely to be listed under Section 4 or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).

(b) SECRETARY's OPINION. -- Consultation under subsection (a)(2) with respect to any agency action shall be concluded within 90 days after the date on which initiated or within such other period of time ~~as is mutually agreeable to the Federal agency, and the Secretary~~ agreeable to the Federal agency, the permit or license applicant, if any, and the Secretary. When the consultation period is extended by agreement, the Secretary shall specify the information required to complete the consultation and the date on which the biological opinion will be completed. Promptly after the conclusion of consultation, the Secretary shall provide to the Federal agency concerned a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. The Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or the permit or license applicant in implementing the agency action.

(c) BIOLOGICAL ASSESSMENT. -- (1) To facilitate compliance with the requirements of subsection (a)(2) each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no construction has begun on the date of enactment of the Endangered Species Act Amendments of 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a bilogical assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary, the applicant (if any) and such agency, and before any contract for construction is entered into and before construction is begun with respect to such action. When the biological assessment period is extended by agreement, the agency shall specify the information required to complete the assessment and the date on which the assessment will be completed. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of Section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

Conclusion

The Western Regional Council has identified three areas in S. 2309 which we believe need revision and have presented amendment language which will hopefully rectify the problems we have identified. Revisions in these areas would, in the opinion of the WRC, result in a more efficient implementation of the Act while still giving support to its underlying concepts.

Thank you for this opportunity to testify and for your consideration of the Western Regional Council's views.

STATEMENT BY ROLAND C. FISCHER, SECRETARY-ENGINEER, COLORADO RIVER WATER CONSERVATION DISTRICT, GLENWOOD SPRINGS, COLORADO, IN CONNECTION WITH HEARINGS HELD APRIL 19 AND 22, 1982 ON S. 2309 AND S.2310 BEFORE THE SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION OF THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS, HONORABLE JOHN H. CHAFEE, CHAIRMAN

Mr. Chairman and members of the Subcommittee, my name is Roland C. Fischer and I am Secretary-Engineer of the Colorado River Water Conservation District ("District" or "River District") in Glenwood Springs, Colorado.

By way of identification, the River District is a public agency created in 1937 under the laws of the State of Colorado (Colo. Rev. Stat. § 37-46-101) to conserve and develop the waters of the Colorado River and its tributaries within Colorado and to protect for Colorado the waters of the Colorado River System to which the State is entitled under the Colorado River Compact. Our jurisdiction covers all of twelve and parts of three other counties within the State on the western slope of the Continental Divide. The District is the major water policy agency of the State with respect to the principal headwaters of the Colorado River. We also hold numerous conditional decrees for the use of water within the State for irrigation, domestic, municipal, industrial and hydroelectric purposes. The River District has held preliminary permits for hydroelectric projects issued by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act, and we are currently a license applicant before FERC for a major multipurpose water conservation and hydroelectric project on the Yampa River in northwestern Colorado known as the Juniper-Cross Mountain Project. We also are in the advanced stages of planning, for development by a sub-district of the River District, another multipurpose water storage project on the White River near Rangely, Colorado, to be known as the Taylor Draw reservoir.

I have previously submitted written testimony in connection with the oversight hearings on the Endangered Species Act ("ESA" or "Act") held by this Subcommittee in December 1981. I also submitted a similar statement to the House Subcommittee in connection with the ESA reauthorization hearings which it held in March of this year. At this time, I would like to reconfirm the position taken by the River District in those statements and to incorporate those statements by reference in my testimony today. It remains the District's position that the Endangered Species Act, and particularly section 7, poses unreasonable and sometimes fatal impediments to even essential management of the Nation's water resources, and that nothing short of a substantial realignment of agency responsibilities under section 7 can bring about a more sensible administration of the Act's admirable goals.

I have reviewed S. 2309 and am disheartened that the bill as introduced leaves the Act essentially intact, with only minor "fine-tuning" proposed. We applaud the Subcommittee's proposals to streamline the exemption process under §7(h) and to expand the exceptions to the Act's taking provisions under §7(o). However, none of the changes proposed in S. 2309 will serve to alleviate the kinds of delay, frustration and expense which the River District has encountered under the ESA in pursuing an FERC license for the Juniper-Cross Mountain Project, and which we and many others are likely to encounter in pursuing future projects. We firmly believe that species preservation can co-exist with orderly management and development of the Nation's resources, but greater flexibility is needed where conflicts between these two essential objectives occur.

Our biggest problem with the current Act is the virtually absolute veto power it vests in the Secretary of the Interior over any Federal action which is "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical . . . ." (ESA Section 7(a)(2).) The celebrated snail darter case, Tennessee Valley Authority v. Hill, dramatically illustrated how Section 7(a)(2) makes species preservation the most important item on the Federal agenda. It effectively bars the exercise of the jurisdiction of other Federal agencies, which have their own legislative mandates, upon a factual finding by the Secretary that a listed species or its habitat is likely to be jeopardized by a project. There is no room for Interior or the action agency to balance other legitimate social goals against the goal of species preservation. S. 2309 does nothing to alter this imprimatur.

As you know, when Congress amended the ESA in 1978 it created a procedure whereby a frustrated project sponsor could ostensibly gain an exemption from the prohibitions of § 7 by taking his case to a so-called Endangered Species Committee. At the time of that amendment, the exemption committee concept no doubt was viewed by Congress as a major concession to development-oriented groups which had complained bitterly about the inflexibility of § 7. However, the history of the Endangered Species Committee speaks for itself: it simply has not provided the flexibility it was intended to, and in fact it has even considered only three exemption applications and dismissed one of those as premature. One reason the Committee has been a failure is the time and expense it takes just to reach that point in the Act's administration.

Above all, however, we do not think it is reasonable to make the section 7(h) exemption process the only recourse for a project sponsor whose project has received a jeopardy opinion from the Secretary. Under the current Act the exemption procedure before the Endangered Species Committee is the first point in the entire legislative scheme at which it is permissible to balance the economic and other beneficial aspects of a particular project against the goal of preserving the particular species involved. It would be far more logical, upon a finding of jeopardy by the Secretary, to give the Federal action agency the authority to balance the interests involved and the ultimate decisional responsibility as to whether the benefits of the proposed project outweigh the costs to the species. If the agency rules adversely to the species, that decision could be judicially reviewed; if the action agency rules against the project, the project sponsor then could take his case to the Endangered Species Committee. The action agency, however, is in a better position preliminarily to weigh the potential benefits of a project vis a vis the need to preserve the species.

The fear has been expressed that the various Federal action agencies are insensitive to environmental concerns, and are intent upon carrying out only their own legislative mandates. I can assure you that such is not the case, particularly at FERC where environmental concerns are an integral part of the licensing process and will be scrupulously considered, as demonstrated by our experience with the Juniper-Cross Mountain Project. Indeed, under the National Environmental Policy Act, the Fish and Wildlife Coordination Act, the Clean Water Act and a host of other environmental statutes, Federal agencies are constantly scrutinizing their programs with environmental protection very much in mind. These agencies are therefore uniquely capable of balancing their individual administrative missions with fish and wildlife and other environmental concerns. The Interior Department is not capable of performing this dual role; it has but one legislative mandate. And as for the Endangered Species Committee, I think it is beyond dispute that the composition of the Committee under the present Act is highly stacked in favor of species preservation at any cost.

One result of the Act's inflexibility which is of real concern to us, and should be of concern to all, is the de facto interstate apportionment and intrastate appropriation of waters which the FWS is effectively accomplishing by imposing substantial minimum flow releases on water storage projects. For example, in order to obtain a non-jeopardy opinion on the Colorado River squawfish from FWS on its White River Dam, the State of Utah recently had to agree to release a minimum of 250 second-feet (cfs) of water at the dam during most of the year, with higher releases in the spawning period, and to augment the minimum flow by up to 5000 acre-feet from inactive storage when natural river flows fall below the 250 cfs minimum. And as matters stand now, our own sub-district's Taylor Draw reservoir, also to be constructed on the White River above Utah's project, will be forced to release up to 200 cfs, depending upon river flows. All of this has the potential to interfere with appropriative rights under State water laws as well as interstate apportionments under the Upper Colorado River Basin Compact.

Another major problem under the present Act which is not addressed in S. 2309 is the peculiar anomaly created by the structure of the biological assessment and consultation processes under Sections 7(c) and 7(a)(2), respectively. Section 7(c) as currently enacted puts the onus of conducting a biological assessment upon the action agency. In most cases, that agency has neither sufficient technical expertise in fish and wildlife matters nor the financial resources necessary to hire outside consultants to perform the biological assessment. In practice, then, the burden of supplying data for the biological assessment usually is passed by the agency to the non-Federal entity which is seeking a license or permit. This entity likewise is usually ill-equipped to perform the detailed functions now required by FWS in a biological assessment, and must of course engage its own outside consultants — at considerable expense — to carry out those tasks. The question naturally occurs as to why the Act does not designate FWS (or in appropriate cases the NMFS) as the lead agency in the preparation of biological assessments. After all, as the agencies which list the species as endangered or threatened to begin with, it is these agencies that obstensibly possess the type of knowledge and expertise needed to conduct the type of biological assessment which their own draft regulations would require. But as the law stands now, once FWS has merely identified any listed species or species proposed for listing that "may be in the area" of a proposed project, it is up to the action agency (and thus usually the project sponsor) to complete the biological assessment. There is no statutory requirement that FWS share its expertise during this process. And the anomaly of forcing the project sponsor to conduct the biological assessment on its own is exacerbated by the fact that Section

7(a)(2) does not make the project sponsor a party to the subsequent inter-agency consutation process.

In the case of the River District's license application for Juniper-Cross Mountain, the reality of this illogic has come true. Under the procedures of Section 7(c), FWS informed FERC under date of October 22, 1980 that the following species of endangered animals and plants may occur in the area of influence of the project: bald eagle, American peregrine falcon, Colorado River squawfish, bonytail chub, humpback chub, and Uinta Basin hookless cactus. The Yampa River beardtongue was also identified as a plant which "may be designated as a proposed species" in the near future, and thus should also be studied. FERC thereafter submitted a data request in April 1981 to the River District requiring the District to obtain and report all information necessary to complete a biological assessment for each of these species. In addition to the more routine information requested, FERC asked the District to identify spawning and rearing areas or habitat in the Yampa River and in the Green River below the confluence of the Yampa River downstream to Jensen, Utah; to describe the chemical, physical and thermal characteristics of these areas; to identify the seasonal movements and distribution of each of the endangered fishes in the same river stretches; to describe the cumulative effects of this and other projects on each species and its habitat; to describe effects of diurnal water level fluctuation on backwater areas and other habitat types believed to be important to the endangered fishes, etc. All of this required considerable effort by expert consultants at substantial cost. Attempts to consult with FWS during this process were rebuffed as "premature." Nevertheless, the data we accumulated was submitted to FERC on July 29, 1981 and thus far there has been no further word to the District on it.

Our experience with Juniper-Cross Mountain is one concrete "horror story" that we have to tell about the Endangered Species Act, but unless the Act is further amended it will not be the last. We have seen the almost extortionate conditions attached to Interior's recent "no jeopardy" opinion on the White River Dam project sponsored by the

State of Utah, and FWS is seeking to attach similar conditions on our Taylor Draw Reservoir, also on the White River. These of course are not the only entities which are likely to encounter problems under the Act. The unique concentration of numerous listed species in the Upper Colorado River Basin and the three fish listings, in particular, pose a serious threat to the entire future of water resources management in that Basin. I am sure I don't have to tell you how precious water is in Colorado and the entire West, but I hope you will believe me when I tell you that the Endangered Species Act does indeed pose a very serious threat to its efficient conservation. The River District sincerely hopes that Congress will not wait until the horror stories are too numerous to document before it takes steps to bring about a more sensible and balanced administration of the Act.

One other point I'd like to make concerns the treatment of experimental populations in S. 2309. While a nominal effort obviously was made to protect resource management options in areas where experimental populations are introduced, we do not believe the bill goes far enough in that regard. As introduced, the bill would treat experimental populations as "threatened" species (whether the species is listed as endangered or threatened), unless the particular population is deemed by the Secretary not to be essential to the continued existence of the species, in which case the population will be treated as a species "proposed to be listed" for purposes of Sections 7(a)(2), 7(a)(3) and 7(c). Despite these protections, I think it would still be too easy under the proposal for the Secretary to introduce a population of a listed species into a new habitat, determine that the population is essential to the preservation of the species, and thereby eliminate valuable resource management and development options in the affected area. As a matter of fact, precisely in anticipation of this type of program the Colorado legislature in 1979 passed House Joint Resolution 1055, which urged the Colorado Division of Wildlife to cease all expenditures of State funds for the purpose of breeding, stocking and hatching endangered or threatened species of fish in the waters of

Colorado. The Joint Resolution also urged the State wildlife agency to terminate its cooperation with the United States FWS with regard to such matters and asked the Governor to prohibit these breeding, stocking and hatching activities in Colorado.

Accordingly, the River District suggests that any experimental populations be treated as unlisted species, unless the Secretary by regulation determines, on the best available scientific evidence, that the parental stock of the species is in decline and in imminent danger of extinction and tha the experimental population is therefore essential to the species' survival. Even in the case of an "essential" experimental population, some safeguard should be enacted to ensure that the location of such a population is selected so as not to interfere with any potential development or resource management project when such interference is avoidable. In addition, there should be a "grandfather" provision in the bill ensuring that any previously ongoing management and development activities in the area of the population's reintroduction will not be affected by the experimental population.

My final request is that, in the event none of our substantive recommendations are adopted this year, the ESA be reauthorized for one year only. The River District feels it is absolutely essential that the crippling burdens it has experienced under the ESA be alleviated so that project sponsors will not face them again in the future. If change is not possible this year, Congress should at least provide for another look at the statute next year.

Thank you very much for the opportunity to appear and present this statement.

COLORADO RIVER WATER
CONSERVATION DISTRICT

April 22, 1982

The Honorable John H. Chafee, Chairman
Subcommittee on Environmental Pollution,
Senate Committee on
Environment and Public Works
Dirksen Senate Office Building
Washington, D.C. 20510

Re: S. 2309 - Endangered Species Act Reauthorization

Dear Senator Chafee:

As a supplement to my testimony before the Subcommittee this morning I would appreciate your including in the record a copy of the attached document to which I referred during the course of my testimony.

This document is a copy of H.J.R. 1055 of the legislature of the State of Colorado, as reprinted from page 2650 of the House Journal, June 30, 1979. This resolution comments on the possible establishment of experimental fish populations and urges that Colorado agencies cease such activity until such time as the effects of such activities can be assessed and evaluated.

I again want to thank you and the Committee for the opportunity to present testimony on this Act. The implementation of the Act in its present form continues to have a measurable, adverse impact on the utilization of water resources in our State, and I am very hopeful that changes will be made in it.

Sincerely,

Roland C. Fischer
Secretary-Engineer

encl.
RCF:bm
cc: Senate Committee
Senators Armstrong, Hart

Second Regular Session

Fifty-third General Assembly

LDO NO. *82 0681/1

APR 15 1982

COLORADO RIVER WATER
CONSERVATION DISTRICT

STATE OF COLORADO

BY SENATOR Anderson

SENATE JOINT MEMORIAL NO. 1

URGING THAT THE GOVERNMENT OF THE UNITED STATES REFRAIN FROM INTERFERING WITH STATE WATER ALLOCATION SYSTEMS, WATER RIGHTS, AND COMPACT ENTITLEMENTS THROUGH MISUSE OF THE ENDANGERED SPECIES ACT.

WHEREAS, For over one hundred years the Government of the United States has recognized and deferred to the doctrine of prior appropriation of water, more commonly known as the "Colorado doctrine"; and

WHEREAS, Over that time span the Congress of the United States has passed at least thirty-seven different laws expressing its deference to state water allocation systems and water rights created under those systems; and

WHEREAS, In reliance on this deference by the United States, the western states have grown and prospered in a water-short region, to the benefit of the nation as a whole; and

WHEREAS, Many western states have entered into compacts among themselves apportioning the flows of interstate streams, so that multiple beneficial uses of water may be made equitably and fairly between the states out of the available natural supply; and

WHEREAS, The Congress of the United States has approved nine interstate compacts to which Colorado is a party, including the Colorado River Compact, the Upper Colorado River Basin Compact, and the South Platte River Compact; and

WHEREAS, The purpose of these compacts was to provide stability for long-range planning and development of water resources, according to each individual state's laws, needs, and desires; and

WHEREAS, Any regulatory action by the Government of the United States which prevents the states from developing their water resources would be a fundamental breach of the federal system of government; and

Capital letters indicate new material to be added to existing statute.
Dashes through the words indicate deletions from existing statute.

WHEREAS, Use of the Endangered Species Act to require allocated flows of one state to flow into another state would be an extreme misuse of the Endangered Species Act; and

WHEREAS, Properly obtained water rights of the Government of the United States are subject to integration and administration within Colorado's system of prior appropriation; and

WHEREAS, Colorado recognizes instream flow appropriations for the protection of the natural environment to a reasonable degree, when such flows are obtained consistent with state law; and

WHEREAS, The Solicitor Coldiron OF on the Department of Interior has issued an opinion stating that the Government of the United States must pursue its water claims and rights within the context of state law systems; and

WHEREAS, The Executive Branch of the Government of the United States is called upon to interpret and implement the Endangered Species Act in a correct manner; and

WHEREAS, The Congress of the United States now has before it the proposed reauthorization of the Endangered Species Act; now, therefore,

Be It Resolved by the Senate of the Fifty-third General Assembly of the State of Colorado, the House of Representatives concurring herein:

(1) That the Government of the United States interpret and implement the Endangered Species Act in such a manner that each state will be allowed to fully develop and administer its compact allocations and water resources according to its own laws and practices; and

(2) That Congress, if necessary, reaffirm its longstanding deference to state water allocation systems, and water rights created under those systems, through passage of an appropriate interpretative amendment to the Endangered Species Act.

Be It Further Resolved, That copies of this Resolution be sent to each member of the Congress from Colorado and to the Secretary of Interior of the United States Department of Interior.

NATIONAL WILDLIFE FEDERATION
1412 Sixteenth Street, N.W., Washington, D.C. 20036 202—797-6800

STATEMENT OF THE
NATIONAL WILDLIFE FEDERATION

BEFORE THE
SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION
OF THE
SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

CONCERNING

S.2309, A BILL TO REAUTHORIZE AND
AMEND THE ENDANGERED SPECIES ACT

April 22, 1982

Presented by:

Patrick A. Parenteau
Vice President for Resources Conservation
National Wildlife Federation

The National Wildlife Federation (NWF) appreciates this opportunity to submit this statement on S.2309 and S.2310, which would reauthorize funding for the Endangered Species Act of 1973, as amended (ESA).

NWF is this nation's largest not-for-profit citizen conservation-education organization with over 4.2 million members and supporters in all fifty states, Guam, Puerto Rico, and the Virgin Islands. NWF has a strong and continuing interest in the protection of endangered species. In a recently completed poll of NWF members, 96 percent of the 36,000 respondents agreed that Congress should continue to protect endangered species from developments that threaten them. And, at our 46th Annual Meeting last month, NWF adopted a resolution that called for maintaining, and strengthening where possible, the key protective provisions of ESA during reauthorization (Appendix A).

In testimony before this Subcommittee on December 8, 1981 and before the House Subcommittee on Fisheries and Wildlife Conservation and the Environment on March 8, 1982, NWF has stressed the following points:

1. Vertebrates, invertebrates, and plants should receive equal consideration for protection under ESA;

2. All species that are endangered or threatened must be listed;

3. ESA should be improved to facilitate listing of species in need of protection;

4. Reintroductions of endangered and threatened species should be encouraged under ESA;

5. Adequate and reliable funding for federal/state cooperative programs under Section 6 of ESA is essential to the protection and recovery of endangered and threatened species.

6. The Section 7 consultation process is not stopping or unreasonably delaying projects;

7. The procedures and requirements of Section 7 relating to federal agency actions must be retained and strengthened;

8. Section 7(b) should be amended to limit the scope of work that could be done on a proposed project pending completion of studies necessary to render an adequate biological opinion;

9. The Court of Appeals' requirement for new guidelines on export of bobcat pelts is contrary to wildlife management practices and should be overturned; and

10. ESA should be reauthorized for five years.

Given the testimony presented by NWF and other conservation and industry organizations, we find the Administration's request for a two-year reauthorization of ESA with no amendments (S.2310) surprisingly inadequate at this point, even as a basis for discussion. A number of improvements to ESA and a longer authorization clearly have been well documented.

In this regard, we commend Senators Chafee, Mitchell, and Gorton for providing what is basically a carefully considered, sensitive starting point for discussion of amendments to ESA. In our discussion of the specific amendments proposed in S.2309 that follows, it is important to keep in mind that many of the most noteworthy and commendable aspects of the bill are those that would retain ESA in its current form and, therefore, are not addressed in the suggested language changes.

Under S.2309, protection for all species, subspecies, and populations of plants and animals would continue. The Act would continue to provide for international cooperation in the conservation of endangered and threatened species, as well as provide for effective implementation of international conservation agreements. Authorization to acquire habitat for threatened and endangered species would continue under S.2309. Most importantly, the key restrictions and protections of Section 7 that require federal agencies to insure that their actions are not likely to jeopardize a species' continued existence or destroy or adversely modify its critical habitat would not be weakened by the bill. NWF applauds the sponsors of S.2309 for not allowing this cornerstone of ESA to be eroded.

The remainder of our testimony will concentrate on the specific changes to ESA proposed in S.2309.

I. Specific Comments and Recommendations on the Amendments Proposed in S.2309.

A. Section 2. Experimental Populations

Section 2 of S.2309 establishes a category and set of provisions for populations of endangered and threatened species that are introduced to areas outside their current range. The amendment seeks to encourage the establishment of new populations of endangered and threatened species by relaxing the restrictive requirements of FSA and, thus, reducing potential conflicts with current or future uses of areas where such populations are released.

NWF supported an amendment to ESA to facilitate introductions of experimental populations in its testimony before the House Subcommittee on Fisheries and Wildlife Conservation and the Environment on March 8, 1982. Consequently, we strongly support the objective of this section of the bill. There are, however, a number of ambiguities in the proposed language that we fear may lead to future controversy and litigation that, in turn, would thwart the purposes of the amendment. Specifically, NWF recommends that further language be developed to establish criteria for determining which populations, particularly existing ones, are experimental and which experimental populations are nonessential.

B. Section 3. Cooperation with the States

NWF supports the proposal in S.2309 to change the cost sharing formula for federal/state cooperative endangered species programs from 2/3 federal: 1/3 state to 3/4 federal: 1/4 state. This change would bring cooperative programs under ESA into line with other federal/state cost-sharing programs for fisheries and wildlife conservation. We are equally pleased that the authorization level for Section 6 appropriations has been increased in the bill.

However, neither of these changes will have meaning unless there is an adequate and reliable appropriation of the authorized funds. We encourage the Committee to strongly stress those needs in the report accompanying the legislation.

C. Section 4. Listing Process

NWF has emphasized in testimony before this Subcommittee that species are not being listed and that steps must be taken to facilitate the addition and removal of species to the lists. The 1978 amendments to ESA required that critical habitat be designated, to the maximum extent prudent, before a species could be listed. In designating critical habitat, the 1978 amendments further required the Secretary to consider the economic impact of specifying any particular area as critical habitat. The result of this latter requirement under Section 4(b)(4) has been to burden the listing process with a myriad of non-biological factors and, as a result, to greatly decrease the number of listings.

Excluding the listings that already had been proposed before the 1978 Section 4 amendments, there have been only 13 new listings since those changes; in only one of the 13 new listings was critical habitat designated. Thus, the current requirements associated with the designation of critical habitat have failed on two grounds. First, they have not resulted in the designation of critical habitat. Second, they have delayed or stopped listings.

The amendments to Section 4 of ESA proposed in S.2309 clearly are intended to rehabilitate this crippled listing process and NWF applauds that effort. Unfortunately, the proposed revision fails to either segregate or remove the economic considerations associated with the designation of critical habitat from the biological determination of listing. The decision as to whether a species is endangered or threatened, and therefore in need of protection, should be based solely on biological information and should be kept distinct from other considerations. The continued burden of economics on the listing process greatly reduces the probability that the changes proposed in Section 4 of S.2309 will increase the number of species listed. NWF would suggest either the deletion of Section 4(b)(4) from the current Act or, as we suggested in our testimony before the House, revising the Act so that the Secretary has the discretion to designate critical habitat independent of the listing process.

NWF supports the proposed changes that would require the Secretary to decide one way or another whether a species should be added to or removed from the list. NWF believes, however, that the time from determination of substantial scientific information to a final determination, which may be as great as three years, should be shortened. NWF recommends that, contrary to the proposal of S.2309, the Secretary not be given undefined discretion over whether to propose a species for listing once he has made a determination that substantial scientific information indicates that such species may be threatened or endangered. NWF supports the changes to proposed Sections 4(b)(2) and 4(b)(3) recommended by Michael J. Bean of the Environmental Defense Fund that would retain the priority review system required by Section 4(h)(3) in the current Act but remove the discretion over whether to propose a species for listing.

D. Section 5. Exemption Process

Although industry criticism that the current process for exempting federal agencies from the Section 7 jeopardy clause is time-consuming and unworkable remains undocumented, the sponsors of S.2309, nevertheless, have sought to be responsive by substituting the Secretary of Interior or Commerce for the present three-member Review Board and shortening the process from 360 to 200 days.

In testimony before the House, NWF presented an amendment to improve the exemption process and, therefore, supports the objective of the revision proposed in S.2309. However, NWF opposes the substitution of the Secretary of Interior or Commerce for the Review Board. The present three member Review Board consists of an appointee of the Secretary of Interior, an appointee of the governor of the state involved, and an administrative law judge. This structure represented an attempt to balance competing political interests on either side of a central figure, the administrative law judge, who would be insulated from political considerations and, thus, would be likely to be unbiased.

Many political considerations may be involved in the decision by the Endangered Species Committee whether to grant an exemption, but that Committee is limited to an extent by the record compiled by the Review Board. If the Review Board is discarded in an effort to "streamline" the exemption process, then it is important to maintain the objectivity of the administrative law judge in conducting hearings, receiving testimony, making findings of fact, and in preparing the report for the Committee. The Secretary of Interior or Commerce or his designee is too likely to be susceptible to political considerations to prepare a report based on an objective finding of fact.

We urge this Subcommitte to adopt NWF's recommendation to substitute an administrative law judge for the Review Board in order to ensure that the record on which an exemption is based is compiled by a politically neutral figure.

E. Section 6. Consultation Process

This section of S.2309 would allow the consultation period under Section 7 to be extended only if the extension is mutually agreeable to the Federal agency involved, the Secretary of Interior or Commerce, and the permit or license applicant. The current ESA does not give the permit or license applicant a say in whether consultation should be extended.

NWF believes that it is appropriate to involve the applicant in the discussion of whether consultation should be extended and that the applicant's needs should be considered at that time. It is inappropriate, however, for the permit or license applicant to have veto power over the question of extending the consultation period. The purpose of the consultation process is to provide sufficient biological information to enable the federal agency involved to determine whether its proposed activity is likely to jeopardize the continued existence of protected species or harm or destroy their habitat. The consultation process is not complete until the wildlife agency issues a biological opinion that provides the necessary information to guarantee compliance with ESA and the suggested reasonable alternatives to avoid species jeopardy. When there is insufficient information available to the wildlife agency to complete consultation within the required 90-day time frame, the proposed amendment would allow the private applicant, who has a great economic interest in proceeding with the proposed action, to prohibit further study and development of alternatives. This exercise of a veto by permit or license applicants will intensify the problem faced by wildlife agencies of what to do when there is insufficient information to determine whether a protected species will be jeopardized and may result in a greater number of jeopardy opinions. Another outcome of a permit or license applicant veto may be that the opportunity to find alternatives that will allow project construction while conserving endangered species will be foreclosed. It has been amply demonstrated in testimony before this

Subcommittee that the current Section 7 process has been successful in reducing conflicts between the objectives of project construction and species conservation. NWF believes that the success of that process argues against the proposed change of Section 7(b).

F. Section 7. Exception on Taking

S.2309 would exempt project activities addressed in the biological opinion prepared under Section 7 of ESA from the prohibitions in Section 9 against taking individual members of an endangered species.

Industry has argued that under the current Act it is possible that project activities that receive no-jeopardy opinions might still be prevented if they resulted in the taking of individuals. S.2039 would remove the possiblity of double jeopardy.

NWF agrees that the current Act should be amended to prevent this possibility. As currently drafted, however, the amendment proposed in Section 7 of S.2309 is unacceptable because it fails to limit adequately the taking of individuals. Exemption of project activities from the prohibitions in Section 9 against taking should be qualified to require that the best economically and technologically practicable techniques be utilized to limit reasonably avoidable take.

G. Section 8. Convention Implementation

Under this section, S.2309 overturns the Court of Appeals' ruling (Defenders of Wildlife, Inc. v. Endangered Species Scientific Authority, 659 F.2d 168 (D.C. Cir. 1981)) that "[t]o make a valid no-detriment finding, the guidelines must require a reliable estimate of the total number of bobcats and the number of bobcats to be killed in the season." Specifically, the amendment proposed in S.2039 would require the Secretary to determine whether export is detrimental to a species listed under Appendix II of the Convention on the basis of the "best biological information derived from reliable wildlife management practices." The Secretary would not be required to use estimates of population size in making a decision on export when those estimates are not the best available biological information dervied from reliable wildlife management techniques.

NWF supports this amendment. It in no way reduces the protection afforded bobcats under CITES. The Secretary is required to use the best available biological information, and he is required to use estimates of population size when those estimates are the best available biological information. The amendment does reject the Court's presumption that reliable estimates of total numbers are feasible and inherently superior to other methods of managing wildlife populations to prevent over exploitation. There is no hierarchy of wildlife management techniques that is headed by estimates of total numbers. Efforts expended by state agencies should be directed toward gathering the best available biological information. Where a given level of effort will provide highly reliable indices of population trends and estimates of other population parameters and somewhat less reliable estimates of total population size, we would certainly prefer that the former be used in determining harvest.

NWF would recommend that the adjective 'reliable' that appears prior to "wildlife management practices" be deleted. We believe that the standard is clear: "best available biological information". The various adjectives that have been suggested to modify "wildlife management practices" all, including "accepted", have undefined and uninterpreted meaning and none contribute to the clarity or restrictiveness of the standard. Each of the adjectives serves only as a handle for future litigation and controversy.

H. Section 11. Authorization

NWF commends the sponsors of S.2309 for proposing a three year authorization of ESA and supports that proposal.

II. A Proposed Amendment to Resolve the What-To-Do-When-You-Don't-Know Problem

A. The Problem

The consultation process is predicated upon the existence of precise and reliable information--on species biology, project impacts, mitigation options and a host of other variables. Experience has shown that such information is not always readily available when the wildlife agencies are called upon to render biological opinions. This creates the what-do-you-do-when-you-don't-know problem. Changes in § 7, coupled with the current administrative approach to consultation have exacerbated this problem to the point where it threatens to undermine the integrity of the consultation process and to seriously erode the conservation objectives of the Act.

Two legislative changes have unexpectedly combined to create the present dilemma. The first is the 1978 amendment to § 7 which codified the 90-day time limit for consultation, and which prohibited any extension of that deadline except where mutually agreed upon by the wildlife and action agencies. This requirement leaves the wildlife agencies completely at the mercy of the action agencies, who now control when consultation begins, how much project-related information will be generated before and during consultation and whether consultation will be extended for the purpose of filling information gaps discovered during the initial 90 days.

The second change, more troubling than the first, occurred in 1979 when the language of § 7 was changed from "will not jeopardize" to "is not likely to jeopardize." The stated purpose of this change was to clarify not alter the law, to make it clear that 100% certainty was not required to render a non-jeopardy opinion. In other words the purpose of the 1979 amendment was to remove any chance that project proponents would be faced with the impossible burden of disproving jeopardy where the available information was inconclusive. Unfortunately, however, though it disclaims any intent to change the § 7 duty to insure the safety of listed species, in practical effect the amendment has operated to shift the burden of proving an impossible from the action agency to the wildlife agency without addressing the real problem: the need for additional information. Obviously, there must be a better way of resolving scientific uncertainty than simply re-allocating an impossible burden of proof.

B. A Proposed Solution.

Fortunately, the Act already contains the key to resolving this dilemma: Section 7(d). Section 7(d) was added to 1978 for the express purpose of preventing the kind of building-while-consulting that resulted in the Tellico Dam fiasco. The provision prohibits agencies from making any "irreversible or irretrievable commitment of resources" which has the effect of foreclosing any "reasonable and prudent alternative" pending completion of consultation. It is a sensible, middle-ground approach to the problem outlined above. On the one hand, it does not bring everything to a screeching halt while information gaps are filled. On the other hand, it does not allow the kind of irreversible and alternative-foreclosing commitment of resources that destroys the integrity of the consultation process and that biases the outcome of the exemption process (by unfairly weighting the scales in favor of projects already begun versus conceptually better alternatives).

At least one lower court has ruled that § 7(d) continues to apply when the results of the initial 90-day consultation are inconclusive (*North Slope Borough* v. *Andrus*, 486 F.Supp. 332 (D.D.C. 1980)). However because that Court was partially overruled on appeal, leaving the precedential value of its ruling in doubt, and because the current language of Section 7 is somewhat ambiguous regarding the application of § 7(d) beyond the 90-day consultation period, we believe it would be prudent and desirable for Congress to clarify this point by changing Section 7(b) as follows:

> (b) SECRETARY'S OPINION.--Consultation under subsection (a) with respect to any agency action shall be concluded within 90 days after the date on which initiated ~~or-within-such-other period-of-time-as-is-mutually-agreeable-to-the-Federal-agency and-the-Secretary~~. unless the Secretary determines that, due to a lack of available information, consultation must be extended for a reasonable length of time to allow the collection of information needed to render the opinion called for herein. Promptly after the conclusion of consultation, . . .

NWF would like to thank Senators Chafee, Mitchell, and Gorton, and their staffs for drafting a bill that maintains, and in many ways enhances, the protection and recovery of threatened and endangered species. NWF strongly supports the objectives and many of the provisions of S.2309 and looks forward to working with the Subcommittee on those areas where we believe improvements are needed.

APPENDIX A

REAUTHORIZATION OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED

WHEREAS, several recent public opinion polls, including one of the National Wildlife Federation's members, demonstrate strong public support for endangered species; and

WHEREAS, the National Wildlife Federation first demonstrated its support for endangered species more than 26 years ago by selecting the 1956 Wildlife Week theme as "Save Endangered Species"; and

WHEREAS, the National Wildlife Federaton has adopted 14 resolutions, litigated numerous lawsuits, developed extensive educational materials, and established the Institute for Wildlife Research in order to protect and conserve endangered species; and

WHEREAS, ten percent of the world's species may now be endangered and in need of protection, with an estimated loss of one species per day; and

WHEREAS, the rate at which endangered species are lost continues to accelerate as a result of habitat destruction, poor land management, introduction of non-native species, environmental contamination, and commercial exploitation and exceptions for American Indians and native peoples; and

WHEREAS, the extinction of a species represents an irreplaceable loss of genetic material; and

WHEREAS, the Department of Interior has cut the budget of the Office of Endangered Species by more than 20%, has completely eliminated state cooperative grants, has not proposed a single new species listing in the last year, and has proposed that species listings be based on their taxonomic position; and

WHEREAS, the Department of the Interior has unnecessarily delayed new listings and has issued opinions that significantly reduce protection afforded to plants and animals under the Endangered Species Act, including the redefinition of "harm," consideration of the cumulative impacts of projects, and exemption of federal actions in foreign countries; and

WHEREAS, the Endangered Species Act is the essential piece of federal legislation that provides for the protection and conservation of threatened and endangered species; and

WHEREAS, Congress must reauthorize the Endangered Species Act by September 30, 1982; and

WHEREAS, the Endangered Species Act is under heavy attack by industry that has proposed a number of amendments that would seriously erode the Act; and

WHEREAS, the protection of all species threatened with extinction requires both the reauthorization and implementation of a strong and effective Endangered Species Act;

NOW, THEREFORE, BE IT RESOLVED that the National Wildlife Federation, in annual meeting assembled March 18-21, 1982, in Milwaukee, Wisconsin, hereby urges the current Administration to effectively implement and enforce the Endangered Species Act; and

BE IT FURTHER RESOLVED that the National Wildlife Federation supports reauthorization of a strong Endangered Species Act, consistent with the following objectives:

1. The Act must continue to protect all animals and plants that are threatened or endangered for any reason by providing an efficient means of listing based on the best available scientific and commercial data, by

prohibiting federally-approved or undertaken actions that might jeopardize listed species, and by prohibiting all activities that would result in a taking of any listed species, except as provided in Section 10.

2. The Act must continue to provide for international cooperation in the conservation of endangered and threatened species, as currently provided in Section 8, as well as for the implementation of international conservation agreements, with the exception of the bobcat currently listed in the CITES treaty and that it be removed as requested by the U.S. Fish and Wildlife Service.

3. The Act must continue to authorize the acquisition of habitat for threatened and endangered species.

4. The Act must continue to require all federal agencies to carry out programs for the conservation of listed species, using all measures necessary to bring these species to the point at which the protection of the Act is no longer needed.

5. The procedures and requirements of Section 7 relating to federal agency actions must be retained or strengthened. Biological opinions must continue to be the responsibility of the U.S. Fish and Wildlife Service and the National Marine Fisheries Service and must be based strictly on biological considerations. Exceptions to the requirements of Section 7 should be granted only if there has been a good faith effort, through consultation, to avoid endangered species conflicts in actions for which there is clearly demonstrated regional or national economic necessity and the absence of reasonable alternatives, and provided that measures to mitigate the effects of such actions are required to be undertaken.

6. The opportunity for meaningful public participation in the implementation of the Act through petitions for the listing of particular species and the initiation of citizen lawsuits must be preserved.

7. The Act must be adequately funded to ensure that its purposes are effectively carried out and that it is rigorously enforced. This includes funding grants-in-aid to states for the conservation of threatened and endangered species and recognizing the right of states to enact and enforce laws more restrictive than the Act itself.

8. The criminal penalty provisions of the Act must be strengthened to make them comparable to those of the Lacey Act, as amended in November, 1981.

9. In general, the Act must be reauthorized and strengthened as much as possible.

STATEMENT OF
W. SAMUEL TUCKER, JR.
DIRECTOR OF ENVIRONMENTAL AFFAIRS
FLORIDA POWER AND LIGHT COMPANY
ON BEHALF OF
THE EDISON ELECTRIC INSTITUTE
BEFORE THE
SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE
April 22, 1982

Mr. Chairman and members of the subcommittee, I am W. Samuel Tucker, Jr., Director of Environmental Affairs for the Florida Power and Light Company. I appreciate the opportunity to appear here today on behalf of the Edison Electric Institute (EEI) to discuss S. 2309, the Endangered Species Act Amendments of 1982. EEI is the association of investor-owned electric utility companies in the United States. Its members serve 99 percent of all customers of the investor-owned segment of the utility industry and 77 percent of all of the nation's electricity users.

The service areas of most electric utilities are within the habitats of many different endangered species. Many electric utility facilities and properties, such as reservoirs and powerline rights-of-way, provide habitat for and attract endangered species. Electric utilities employ numerous biologists, wildlife experts and pollution control experts to plan, construct and operate their facilities in a manner which is compatible with, protects and promotes the recovery of endangered species. Examples of this unique relationship are documented in the EEI movie, "A Second Chance" and the attached report, "Compatibility of Fish, Wildlife and Floral Resources with Electric Power Facilities."

EEI's members have had a long-standing interest in the Endangered Species Act. While my testimony today will address only S. 2309, our views on how the Act should be improved are expressed in EEI's statement submitted on March 8, 1982, to the House Merchant Marine and Fisheries Subcommittee on Fisheries, Wildlife Conservation and the Environment, which is attached to my prepared statement for your information.

We believe S. 2309 contains some excellent and necessary improvements in the Act. For example, Section 7 of the bill responds to a problem identified by EEI and Northeast Utilities, one of our member companies. Presently, the Section 9 prohibition on taking could be applied to restrict activities which have been approved in a "no jeopardy" opinion issued pursuant to Section 7 of the Act. In order to eliminate this inconsistency, EEI and Northeast Utilities proposed that an exemption to the Section 9 "taking" prohibition be created for all activities which are within the scope of an action that is the subject of a favorable biological opinion or that complies with reasonable and prudent alternatives recommended in such an opinion.

While Section 7 of S. 2309 addresses this issue, we recommend a clarification of its provisions to ensure that the exemption applies to all activities which an applicant or action agency has identified at the time of consultation as part of the action being reviewed for Section 7 purposes. Our recommended language is set forth in Appendix A to my prepared statement. This clarification is important because the wildlife agencies generally have not in the past described in detail in a biological opinion all of the individual activities which an applicant identifies as part of a proposed action and which the wildlife agencies have considered before issuing the biological opinion. It would be unnecessarily burdensome to require such extensive detail in future biological opinions. We hope that this clarification expresses the original intent of the drafters of S. 2309 in a manner which avoids any potential ambiguity.

Section 2 of S. 2309 recognizes the need to provide more flexibility in the treatment of experimental populations. Our March 8 position statement advocated the creation of an experimental population category and the modification of those aspects of the Act which are self-defeating because they discourage private interests from supporting the introduction of experimental populations. We believe that if these disincentives did not exist, private parties could support such experiments without concern about restrictions on their own activities. Section 2 of S. 2309 helps eliminate one such potential restriction by proposing to treat experimental populations not considered essential to the survival of the species as "species proposed to be listed" for purposes of the consultation process.

Another disincentive has not been remedied. Senator Mitchell's statement accompanying the introduction of S. 2309 indicates that he, as one of the sponsors of S. 2309, intended to exclude experimental populations from the prohibition on taking.[1] We agree that nonessential populations should be excluded from this prohibition in order to avoid potential liability for an incidental or accidental taking. However, S. 2309 as proposed does not achieve this result. Existing regulations prohibit the taking of threatened species in the same manner as Section 9 prohibits the taking of endangered species.[2/] Thus, the bill's treatment of nonessential experimental populations as threatened species for all purposes other than Section 7 still effectively subjects such populations to the prohibition on taking. As long as this regulatory prohibition is applicable to nonessential experimental populations, private interests concerned about their potential liability for incidental or accidental takings of such populations resulting from operation or expansion of their facilities will be reluctant to support their introduction. We submit that the cumulative benefits of increased private sector support for nonessential experimental populations which would accompany the elimination of the potential liability for takings of such populations will far outweigh the incremental risk of harm which may result. We therefore recommend that the bill eliminate the prohibition on taking for those experimental populations which are subject to modified treatment under Section 7 of the Act.

---

[1] 128 Cong. Rec. S. 3057 (March 30, 1982).

In addition, the scope of populations proposed to be included in the experimental classification is too narrow because of reliance on geographical separation as a criteria for approving an experimental population. The definition of experimental populations in S. 2309 would, for example, not apply to the reintroduction of the bald eagle into those portions of its range where it is endangered, but where reintroduced eagles could commingle with [illegible] native population. It also would not apply to experiments which attempt to breed individuals introduced by man with those already living in the wild. The bill would be more effective in promoting experimental activities if a broader definition of experimental populations were adopted.

The modifications we recommend to improve the treatment of experimental populations are set forth in Appendix B to my prepared statement. Unless these problems are addressed, S. 2309 is not likely to stimulate greater private sector support of experiments to promote species recovery. It would be a shame to leave untapped the vast resources of the private sector which could be utilized to promote species recovery.

Section 4 of S. 2309 attempts to respond to the need for eliminating unnecessary delay by establishing maximum time periods for the various regulatory steps necessary in determining whether to list or delist a species. Delay in these procedures is extremely undesirable. Once a proposal to list or delist a species is made, the process of planning for or completing any activity which could potentially affect the species becomes clouded with uncertainty. Such uncertainty may delay completion of proposed actions which might affect the species. We have long advocated that any decision to list or delist a species must be made expeditiously in fairness to all those whose activities will be affected directly by the decision. While Section 4(6) of the bill proposes time limits for several regulatory steps in the listing and delisting process, we are uncertain whether it covers all the applicable steps since it is not clear whether the determination required in proposed Section 4(b)(3) must be a notice of proposed rulemaking.

To eliminate potential confusion, we are proposing new language in Appendix C which provides that such a determination must be in the form of a notice of proposed rulemaking. With this change, a final decision must be made within 3 years of the receipt of a petition to list or delist a species.

Even if these changes are made and despite our strong desire to avoid unnecessary delay, I must confess that we approach the time limits proposed in Section 4 with some degree of skepticism. In our experience, such time limits have functioned as unenforceable guidelines for the conduct of agency activities and have had only a limited usefulness in expediting agency action.

Moreover, other provisions in Section 4 of the bill impose significant burdens upon the wildlife agencies which may interfere with their ability to comply with the time limits established and significantly increase the uncertainties and delays imposed during the listing process. Proposed Section 4(b)(2) of the Act contained in Section 4(6) of the bill appears especially troublesome. This provision requires the Secretary to "regularly review" lists of endangered species identified by professional scientific organizations, subdivisions of such organizations and state and foreign agencies responsible for the conservation of fish, wildlife or plants. There are an extremely large number of such organizations. It may take a considerable period of time to review the information underlying decisions of these groups that a species is in danger of extinction or likely to become so. During this time, as a practical matter, any private decision which may affect the species is likely to be clouded with uncertainty. Moreover, the decisions of some professional groups and wildlife agencies may be more reliable than those of others. Nevertheless, this provision does not afford the federal wildlife agencies the opportunity to establish priorities in determining which determinations of which groups to review. It thus threatens to tie up the scarce resources of the federal wildlife agencies which should properly be expended on expediting the consultation process and listing and delisting determinations. In short, this provision is likely to cause unnecessary confusion and burdensome administrative delays.

The right to petition the Secretary to initiate a listing or delisting set forth in the proposed Section 4(b)(3) of the Act provides a more efficient alternative to the procedure in the proposed Section 4(b)(2). Any professional society, state or foreign agency or other interested party may use the petitioning procedure to request the Secretary to implement a process to protect species which are in danger of extinction. While the obligation to file a petition imposes a burden upon the petitioner, the burden is minimal. It should not deter those groups which believe that the Secretary can take an action to avoid the impending extinction of a species. However, it should ensure that reviews are not made regarding those species which obviously do not warrant review. This procedure will permit a far more rational allocation of administrative resources. It will also elicit a response from the Secretary in a far shorter time than required under the provisions of Section 4(b)(2) as proposed in the bill.

The changes we recommend to Section 4 of the bill are set forth in Appendix C to my prepared statement.

The modifications to the exemptions process which are proposed in Section 5 of S. 2309 will eliminate some of its cumbersome and lengthy procedures. While we continue to believe that it is far more appropriate to allow economic and social factors to be taken into account with the biological opinion by the action agency, the modifications now proposed go part way toward achieving that result by reducing the delays presently faced by applicants for an exemption based on these factors. For these modifications to reduce delay effectively, however, a permit or license applicant must be able to file for an exemption immediately after the completion of consultation and prior to the time of final agency action. The amendments to Section 7(g)(2)(A) which are proposed in Section 5(b)(3) of the bill do not explicitly allow this procedure. Therefore, we are suggesting alternative language in Appendix D to my prepared statement which clearly provides for this result.

Finally, Section 6 of S. 2309 proposes to modify Section 7(b) of the Act to provide that a permit or license applicant must concur in any decision to extend the 90 day time limit for the completion of a biological opinion. This provision properly recognizes the interests of an applicant in participating in any decision which would delay the ultimate decision on a project.

Mr. Chairman and members of the Subcommittee, I would like to thank you for the opportunity to appear before you today. I am prepared to respond to any questions you may have.

Appendix A

1. On page 20, line 4, strike "and situation".

2. On page 20, line 5, strike "addressed in" and substitute in lieu thereof "which is the subject of".

Appendix B

1. On page 1, strike line 10 and on page 2, strike lines 1 through 17 and insert in lieu thereof "members of an endangered or threatened species which members are introduced by man into a new range, released by man from captivity or removed by man from habitat where the species is not listed as endangered or threatened and introduced into different habitat where the species is listed as endangered or threatened. It also means the progeny of such members."

2. On page 3, line 15, insert the phrase "such experimental population shall not be subject to a prohibition on taking under the authority of this Act, and" after "that,".

Appendix C

1. On page 7, strike lines 1 through 12.
2. On page 7, line 13, strike "(3)" and substitute "(2)" in lieu thereof.
3. On page 7, line 22, strike "determine whether to".
4. On page 7, line 23, strike "(5)" and substitute "(4)" in lieu thereof.
5. On page 7, lines 24 to 25, strike "and publish such determination and his reasons therefore in the Federal Register".
6. On page 8, line 1, strike "(4)" and substitute "(3)" in lieu thereof.
7. On page 8, line 6, strike "(5)" and substitute "(4)" in lieu thereof.
8. On page 8, line 11, insert after "regulation" the phrase "nor more than 12 months from the receipt of any petition referred to in paragraph (2) of this subsection".
9. On page 10, line 1, strike "(6)" and insert "(5)" in lieu thereof, and strike "(4)" and "(5)" and insert "(3)" and "(4)" respectively in lieu thereof.
10. On page 11, line 1, strike "(7)" and insert "(6)" in lieu thereof.
11. On page 11, line 7, strike "(8)" and insert "(7)" in lieu thereof.

12. On page 11, line 24, strike "(5)" and insert "(4)" in lieu thereof.

Appendix D

On page 14, line 9, insert after "submitted" the phrase "from the date consultation is completed until a date".

STATEMENT OF
THE EDISON ELECTRIC INSTITUTE
BEFORE THE
SUBCOMMITTEE ON FISHERIES, WILDLIFE CONSERVATION AND THE ENVIRONMENT
COMMITTEE ON MERCHANT MARINE AND FISHERIES
HOUSE OF REPRESENTATIVES

March 8, 1982

The Edison Electric Institute is the association of investor-owned electric utility companies in the United States. Its members serve 99 percent of all customers of the investor-owned segment of the utility industry and 77 percent of all the nation's electricity users.

EEI's members have a substantial interest and concern in the administration and implementation of the Endangered Species Act. Since endangered species are found in and on the air, waters, and lands of all 50 states, the service areas of most electric utility companies are within the habitats for some or many different endangered and threatened species. (This statement refers to both endangered and threatened species as "endangered species" unless a specific distinction is intended.) Many of the facilities and properties of electric utilities, such as reservoirs, steam power plant properties, and power line structures and right-of-ways, provide habitat for and attract endangered species. Electric utilities employ numerous biologists, wildlife experts and pollution control experts to operate these facilities in a manner which is compatible with, protects and promotes the recovery of these endangered species. Examples of thi unique relationship are documented in the attached report "Compatibility of Fish, Wildlife, and Floral Resources With Electric Power Facilities" and the EEI movie "A Second Chance."

EEI offers this statement to assist this Subcommittee in its review of the extent to which the ESA has been effective in achieving its goals and to suggest how the Act could be improved during the reauthorization process.

The sections of the ESA which most directly affect electric utilities, Sections 7 and 9, are largely proscriptive in nature. They focus almost exclusively upon preventing activities which are perceived as harming endangered species. Unfortunately, by reason of the narrow focus of these provisions, it is easy to lose sight of the fact that the ultimate goal of the Act is to promote the recovery of endangered species to such an extent that these species are no longer in danger of extinction. We fully support this goal. We believe that its achievement would be facilitated if the Act were modified to encourage private sector activities which support the recovery of endangered species and to eliminate those proscriptive measures which are unnecessary, which discourage private initiatives or which conflict with this goal.

Perhaps the most frustrating aspect of the Act is the inherent contradiction between Section 7 and Section 9. Section 7 permits needed development which requires federal approval to proceed, even if an endangered species may be present in the vicinity of the proposed activity or may be incidentally harmed by the activity, if the consultation process concludes that the proposed activity is not likely to jeopardize the continued existence of the endangered species or result in the destruction or adverse modification of its critical habitat.

Section 9, however, appears to undercut Section 7 through its prohibition of any "taking." This prohibition is stated as absolute. An accidental taking of an egg or larvae of an endangered species or the accidental collision of an individual member of an endangered species with a building, transmission line, or other man-made object could result in severe penalties, no matter what precautions were taken to avoid such accidents. Even if the Fish and Wildlife Service (FWS) determines that a proposed action is consistent with the provisions of Section 7 and even if that action is accompanied by special steps to protect endangered species and to encourage them to propagate and thrive, the potential for applying Section 9 still exists. In the Tellico Dam case, the Supreme Court determined that the ESA should be applied strictly.1/ Lower courts have already been faced with requests to enjoin development activities for anticipated violation of Section 9 even though these activities were determined to be consistent with Section 7.2/ The Courts to date have avoided construing the relationship between Sections 7 and 9. The decisions have held that the claims were not ripe for

---

1/ *TVA* v. *Hill*, 437 U.S. 163 (1978).

2/ *California* v. *Watt*, ___ F.Supp. ___, 16 ERC 1729, 1749 - 1750 (D.C. C-I. 1981): *North Slope Borough* v. *Andrus*, 486 F.Supp. 332, 362 (D.D.C. 1980) affirmed, but reversed on other grounds, 642 F.2d 589 (D.C. Cir. 1980).

resolution because the proposed activities at issue would not be implemented physically for several years. Given the language of Section 9, however, the possibility exists that a court may, rightly or wrongly, hold a utility responsible for any "taking" no matter how infrequent or inadvertent. This could be enough to prevent a utility from proceeding at all with needed energy projects which satisfy the Section 7 requirements. Northeast Utilities, a member company of EEI, is submitting detailed testimony to this Subcommittee about the problems it has experienced because of the contradiction between Section 7 and Section 9.

Appendix A to this statement contains proposed statutory language which seeks to clarify the relationship between Sections 7 and 9.

A second major issue confronting electric utility companies when no Section 7 consultation is conducted is the potential for liability under Section 9 for an accidental and unavoidable event which harms or even kills an individual member of an endangered species. Even if the strongest precautions are taken to avoid such accidents, they cannot be eliminated totally. For example, when a water intake structure is located on a body of water which is habitat for endangered fish, it may be physically impossible to eliminate completely the entrainment or impingement of fish, eggs or larvae. Similarly, although utilities have initiated substantial measures to prevent the accidental contact of endangered birds, particularly raptors, with transmission lines, some such contacts may still occur. Although the government appears to have exercised its prosecutorial discretion to avoid litigation when such accidents have occurred, it is inappropriate to perpetuate a strict liability standard in such accidental situations. No company is comfortable operating in any manner which could be conceived of as a violation of a statutory standard. This discomfort is exacerbated by the possibility that opponents to a project could rely upon such accidental takings to seek relief that the government concludes is inappropriate and could attempt to enjoin activities for reasons unrelated to genuine concern about endangered species. Accordingly, we recommend that the prohibition on taking in Section 9 be modified to exempt these accidental takings.

Another major concern with the Act is that it discourages attempts to promote the recovery of species through the introduction of experimental populations in the wild. Experimental populations, for this purpose, refers to the placement of endangered species into the wild in a free state. Presently, the restrictive provisions of Sections 7 and 9 of the Act apply whenever an experimental population is introduced. Private interests are reluctant to encourage the introduction of experimental populations in areas where those private interests operate facilities because of the possibility that the new population may eventually restrict pre-existing or planned future activities. The following examples demonstrate the problems which might arise.

In order to promote the recovery of endangered bald eagles in New York, the FWS approved the introduction in that State of 21 baby eagles which had been taken from nests in Alaska. These particular eagles were neither threatened nor endangered in Alaska.

One of the transplanted bald eagles was electrocuted by contact with an electric power line which was in existence long before that eagle was introduced to New York. However, was that individual eagle really "endangered"? Did its transfer from Alaska to New York vest it with endangered status and thereby the protections of Section 9 of the Act? If a federal agency is asked to permit a new activity in the vicinity of the transplanted group of eagles, must consultation under Section 7 be initiated? If Section 7(a)(2) or Section 9 is applicable, any business would be very reluctant to encourage such otherwise worthwhile experiments.

The FWS has already applied the provisions of Section 7 to an experimental population of whooping cranes. The whooping cranes to which we refer summer in Idaho, winter in New Mexico and migrate seasonally between these locations. These birds were recently transferred to these areas. Their presence has already required a utility to adjust the location of a planned power line right-of-way. Other companies have been required to analyze the potential impact of their activities on this population. Thus, their presence has become a major concern to those siting transmission lines and energy facilities from Idaho to New Mexico. Under these circumstances, companies which are or may become subject to the proscriptions of Sections 7 and 9 as to these reintroduced species have a strong disincentive against supporting or encouraging their reintroduction. If suitable habitat owned by companies is not made available for experimental populations, the provisions of the Act prove self-defeating. If these disincentives did not exist, companies could support such experiments without concern about restrictions on their own activities.

In order to eliminate these disincentives, we agree with the recommendation of the International Association of Fish and Wildlife Agencies (IAFWA) that experimental populations should be exempted from the provisions of Section 9 and should be subject to Sections 7(a)(3) and 7(b) in the same manner as species proposed to be listed. We believe that the cumulative impact of those modifications would be extremely beneficial to the recovery of endangered species because they would encourage and facilitate private sector support of experimental populations. Experimental populations would continue to receive considerable protection under Sections 7(a)(3) and 7(b), through coordination with state wildlife agencies and under the many other federal and state statutes protecting wildlife which continue to apply to such populations. Our suggested statutory changes necessary to implement this concept are presented in Appendix B.

A fourth concern about the Act involves the definition of "species." Under the Act, taxonomic categories such as species are defined strictly. Unfortunately, this may cause results at variance with biologic fact. Species are groups of plants or animals that are reproductively isolated from other such groups. Simply, this means that members of different species maintain their genetic integrity under natural conditions and do not interbreed or hybridize with other similar forms. The criteria for recognizing species are clear and in nearly all cases scholars have little difficulty in making a judgment. However, evolution--which involves the creation of new species--is a continuing process and, accordingly, there are always borderline cases that may engender legitimate disagreement among experts. In addition, it is common to find groups of animals which, at the time of their discovery, were thought to be distinct but, with more research, are later found to be part of a larger, more widespread species.

Taxonomists deal with these cases routinely and without much emotion. But problems can arise when the forms involved in the merging have different legal status. The Mexican duck is an excellent example. In 1967 the FWS listed the Mexican duck as an endangered species. As a result, substantial federal and state investments were planned to protect and promote the recovery of the Mexican duck. However, in 1978, the FWS determined that this classification should be removed because Mexican ducks and common mallards had been interbreeding for hundreds, if not thousands, of years and that the resulting Mexican-like ducks were both numerous and expanding in the range from northern New Mexico to southern Durango, Mexico. 43 Fed. Reg. 32258 (July 25, 1978). As a result, individuals once considered protected by the restrictions of the Act no longer received such protection.

In comparison, extremely small specialized distinctions have been applied to classify different species of snail darters. If a broader approach had been adopted, as occurred with the Mexican duck, some of the problems encountered by Tellico Dam might well have been avoided. While Congress cannot resolve the scientific debate regarding the relative merits of lumping and splitting, we believe it is poor public policy to adopt an excessively narrow definition of "species" for listing purposes.

Finally, the ESA has not incorporated in the consultation process an effective mechanism to balance social and economic considerations. The fact that the Congress specifically amended Section 7 in 1978 to provide for an exemption process which would permit such factors to be considered suggests that the Congress recognizes that there are situations where such balancing is both necessary and appropriate. We believe that these situations are most likely to occur where there is inadequate reliable scientific information regarding the health and extent of the species involved and the manner in which the proposed action might affect the species. Under these circumstances, any prediction in a biological opinion of the potential effect of a proposed action involves explicit judgments and requires considerable speculation. In such circumstances, it is important for an action agency to take into consideration the benefits of the proposed action and balance these factors against the reliability of the scientific data, the potential effects of the proposed action and the likelihood that such effects would occur.

The current exemption process does not address directly the quality or reliability of the scientific information which is the basis of a biological opinion or the issue of uncertainty. Rather, by its very name and emphasis upon "irresolvable" conflict, the exemption process appears to assume far more reliability and certainty in the consultation process than may be warranted in any particular situation. Moreover, the exemption process is far too difficult and time consuming to invoke. Most companies cannot afford to risk the costs of delay which are necessarily involved in seeking an exemption. To remedy these problems, we recommend that the Act be amended to enable an action agency to weigh the benefits of the proposed action against the reliability of the scientific information which forms the basis of a biological opinion before determining whether a proposed action should be approved. A specific recommended amendment is attached in Appendix C.

Alternatively, we recommend a more expeditious exemption process which permits a decision to be made immediately after the consultation process is complete and which explicitly addresses the quality and reliability of the scientific evidence and the potential likelihood of the effects predicted. We also recommend that this process be termed an "appeal" rather than "exemption" procedure because this more accurately reflects the nature of a proceeding in which the sufficiency of evidence supporting a decision is questioned.

APPENDIX A

In order to eliminate the contradiction between Sections 7 and 9, we propose that the present language in Section 7(o) [16 U.S.C. §1536(o)] of the Act be deleted and that the following be substituted in its place:

> Notwithstanding Sections 4(d) [16 U.S.C. §1533(d)] and 9(a) [16 U.S.C. §1538(a)] of the Act or any regulations promulgated pursuant to such sections, any activity which is necessary to carry out (i) any action for which an opinion has been rendered pursuant to Section 7(b) [16 U.S.C. §1536(b)] which concludes that such action is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of the critical habitat of such species, or (ii) any action recommended by the Secretary as a reasonable and prudent alternative pursuant to Section 7(b) [16 U.S.C. §1536(b)] shall not be considered a taking of any endangered or threatened species.

APPENDIX B

EXPERIMENTAL POPULATIONS

We recommend that a new definition for experimental populations be added as subsection 3(7) [16 U.S.C. § 1532(7)] and that the present subsections 3(7) through (21) [16 U.S.C. § 1532(7) through (21)] be renumbered (8) through (22) [16 U.S.C. § 1532(8) through (22)].

> (7) The term "experimental population" means members of an endangered or threatened species which members are introduced by man into a new range, released by man from captivity or taken from habitat where the species is not listed as endangered or threatened and introduced into different habitat where the species is listed as endangered or threatened.

We further recommend that the definitions of endangered species in subsection 3(6) [16 U.S.C. § 1532(6)] and of threatened species in subsection 3(20) [16 U.S.C. § 1532(20)], which would be renumbered as 3(21) [16 U.S.C. § 1532(21)], be amended to exclude individual members of an experimental population.

> (6) The term "endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the

provisions of this Act would present an overwhelming and overriding risk to man. This term shall not apply to individual members of a species which are members of an experimental population.

(22) The term "threatened species" means any species which is likely to become an endangered species within the foreseeable future throughout all of a significant portion of its range. This term shall not apply to individual members of a species which are members of an experimental population.

The establishment and management of experimental populations should be addressed in a new subsection 4(f) [16 U.S.C. § 1533(f)], and existing subsections 4(f) through (h) [16 U.S.C. § 1533(f) through (h)], should be redesignated as (g) through (i) [16 U.S.C. § 1533(g) through (i)]. New subsection 4(f) [16 U.S.C. § 1533(f)] should provide:

(f) EXPERIMENTAL POPULATIONS. Experimental populations shall be designated and managed pursuant to regulations promulgated by the Secretary pursuant to subsection (g) [16 U.S.C. § 1533(g)] of this section and cooperative agreements entered into by the Secretary with any State agency, provided that:

(1) No experimental population shall be established in any State before a cooperative agreement for such population has been developed with the State agency of such State. Such cooperative agreement shall contain provisions relating to habitats in which the population is to be established, protective measures that will be employed, and such other conservation methods and procedures as are deemed appropriate, and

(2) Experimental populations shall be subject to the provisions of subsection 7(a)(3) and 7(c) [16 U.S.C. § 1536(a)(3) and (c)] of the Act as though they are species proposed to be listed, but shall otherwise be exempt from the requirements of Section 7 [16 U.S.C. § 1536] of the Act.

Subsection 9(b)(2)(A)(ii) [16 U.S.C. § 1538 (b)(2)(A)(ii)] shall be amended by the deletion of the last clause as follows.

(ii) any progency of any raptor described in clause (i) [; until such time as any such raptor or progency is intentionally returned to a wild state].

The purpose of these amendments is to establish a completely new category for experimental populations. These populations will be managed pursuant to regulations issued by the Secretary and in accordance with agreements the Secretary enters into with the state wildlife agencies in the states where each population will be established. This procedure will provide maximum flexibility for adopting a management plan appropriate to each experimental population and for experimenting with a variety of approaches and procedures that might not otherwise be permitted by the Act. This amendment is consistent with the position of the International Association of Fish and Wildlife Agencies (IAFWA) presented in testimony before this Subcommittee in requiring cooperative agreements between the Secretary and the state wildlife agencies.

We generally agree with the IAFWA position on the treatment of experimental populations under Section 7, except for their willingness to designate critical habitat for such populations with state wildlife agency concurrence. Retention of this provision would discourage private sector support of experimental populations because of the possibility that the establishment of critical habitat for such populations could limit existing or planned future growth.

APPENDIX C

We recommend that Section 7(a)(2) [16 U.S.C. § 1536(a)(2)] be amended as follows:

> (2) Each Federal agency, shall, in consultation with and with the assistance of the Secretary, [insure that] determine whether any action authorized, funded or carried out by such agency (hereinafter in this section referred to as an 'agency action') is [not] likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical. [, unless such agency has been granted an exemption for action by the Committee pursuant to subsection (h) of this section.] In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available. Each Federal agency shall, based upon a balancing of its determination with the benefits of the proposed action, require mitigation measures it determines to be necessary and appropriate, if any, to minimize the likelihood of jeopardy and obtain necessary benefits of the proposed action.

Subsections 7(e) through 7(q) [16 U.S.C. § 1536(e) through (q)] should be repealed, except for those portions of 7(o) [16 U.S.C. § 1536(o)] recommended in Appendix A above, which should be renumbered 7(e) [16 U.S.C. § 1536(e)].

NORTHEAST UTILITIES
THE CONNECTICUT LIGHT AND POWER COMPANY
THE HARTFORD ELECTRIC LIGHT COMPANY
WESTERN MASSACHUSETTS ELECTRIC COMPANY
HOLYOKE WATER POWER COMPANY
NORTHEAST UTILITIES SERVICE COMPANY
NORTHEAST NUCLEAR ENERGY COMPANY

P.O. BOX 270
HARTFORD, CONNECTICUT 06101
(203) 666-6911

JOHN P. CAGNETTA
VICE PRESIDENT
NUCLEAR AND ENVIRONMENTAL ENGINEERING

April 21, 1982

The Hon. John H. Chafee, Chairman
Subcommittee on Environmental
Pollution
Committee on Environment and
Public Works
Dirksen Senate Office Building
Washington, D.C. 20510

Re: S.2309: Amendment of Endangered Species Act

Dear Mr. Chairman:

Northeast Utilities has reviewed S.2309, which amends the Endangered Species Act of 1973. We are pleased to be able to support this Bill, which we believe constitutes a reasonable approach to solving some of the problems which presently exist under the Act.

In particular, we want to commend your Subcommittee on the proposed amendment to Section 7(o) of the Act which is set forth in Section 7 of S.2309. As you know, Northeast Utilities proposed a substantially similar amendment to Section 7(o) as a result of its experiences in connection with a proposed nuclear power plant in Montague, Massachusetts. Those experiences are described more fully in the attached testimony which I presented on March 8, 1982 before the House Subcommittee on Fisheries and Wildlife Conservation and the Environment. Your proposed amendment would resolve the difficulties faced by Northeast Utilities and others who have received favorable consultations under Section 7 but may still be in peril of violating the prohibition against "takings" in Section 9.

We would like to propose a few minor drafting clarifications to the proposed amendment to Section 7(o). The words "and situation" which appear at the end of the first clause of the new Section 7(o) suggest that in order to qualify for the exemption, the "activity" which gives rise to the taking must not only be within the scope of the "action" which is covered by the biological opinion, but must also be within the scope of the "situation" which is covered by the opinion. The meaning of these words, which are not used anywhere else in Section 7 of the existing Act or anywhere else in S.2309, is unclear. In order to avoid the implication that an applicant must satisfy two burdens instead of one in order to qualify for the exemption, we would suggest that the words "and situation" be deleted.

In addition, the words "addressed in" which appear at the beginning of subparagraph (1) of the new Section 7(o) can be read to mean that in order for the exemption to apply to takings resulting from a particular "activity" which is part of the "action" covered by a biological opinion, that particular "activity" must be described in the opinion. In the past, the consulting agencies have not described in detail in biological opinions all of the individual activities which an applicant has identified as part of a proposed action, and it would be unnecessaril burdensome to require such extensive detail in future biological opinions In order to avoid any ambiguity, we would suggest replacing the words "addressed in" with the words "which is the subject of".

Finally, we would like to provide one comment on Section 4(b) of S.2309 which, among other things, establishes certain time limits for listing and delisting actions. We support these time limits and believe that everyone will benefit from a clearly defined timetable. With this in mind, we observe that there may be a gap between the time when the Secretary decides to add or remove a species from the list pursuant to new Section 4(b)(3), and the time when the Secretary formally proposes a regulation to accomplish this result pursuant to new Section 4(b)(5). A gap may exist because it is unclear whether the Secretary must publish the proposed regulation at the end of the same twelve-month period in which he must decide whether to propose an addition or removal from the list. We recommend that this ambiguity be eliminated by providing that the proposed regulation must be published in the Federal Register within twelve months of the receipt of the listing or delisting petition. This could be accomplished by (1) deleting the words "determine whether to" from the second sentence of paragraph (3) of new Section 4(b) and ending that sentence after the words "paragraph (5) of this subsection", and (2) inserting at the end of clause (A) of paragraph (5) of new Section 4(b) the words "nor more than 12 months from the receipt of any petition referred to in paragraph 3 of this section."

Very truly yours,

John P. Cagnetta

John P. Cagnetta
Vice President
Nuclear and Environmental Engineering

JPC:mar
ATTACHMENT

TESTIMONY OF
DR. JOHN P. CAGNETTA
VICE PRESIDENT, NUCLEAR AND ENVIRONMENTAL ENGINEERING
NORTHEAST UTILITIES

BEFORE THE

SUBCOMMITTEE ON FISHERIES AND WILDLIFE CONSERVATION
AND THE ENVIRONMENT
COMMITTEE ON MERCHANT MARINE AND FISHERIES
U.S. HOUSE OF REPRESENTATIVES

March 8, 1982

Introduction

Mr. Chairman, I want to thank you and the members of the Subcommittee for the opportunity to testify today regarding the reauthorization of the Endangered Species Act. My name is Dr. John P. Cagnetta and I am Vice President of the Nuclear and Environmental Division of Northeast Utilities. I am responsible for the direction and supervision of Northeast Utilities' nuclear engineering and environmental programs, including the environmental programs for all of our nuclear, fossil and hydroelectric power plants under construction and in operation.

One of the environmental programs which I oversee includes the most successful fish passage facility for shad and salmon on the Atlantic seacoast. That facility, and some of Northeast Utilities' other successful environmental programs, are described more fully in an attachment to my testimony.

Northeast Utilities is the parent company of The Connecticut Light and Power Company, The Hartford Electric Light Company, Western Massachusetts Electric Company and Holyoke Water Power Company. The system furnishes electric service to approximately one million customers in Connecticut and western Massachusetts and retail gas service to approximately 150,000 customers in

Connecticut. The companies of the NU system own approximately 5,800 MW of generating capacity located in Connecticut, Massachusetts, New Hampshire, Vermont and Maine, including approximately 2,000 MW of nuclear capacity, 2,600 MW of fossil capacity and 1,200 MW of hydro-electric capacity.

I am here today to propose a single clarification to the Endangered Species Act. This clarification would remove a troublesome contradiction from the Act. That contradiction, which is found in Sections 7 and 9, became evident to Northeast Utilities during the licensing activities for a proposed power plant.

The Problem: The "Double Jeopardy" Risk Under Section 9

Section 7 provides for a consultation process between federal agencies prior to any federal action that might affect the continued existence of an endangered or threatened species or the critical habitat of such species. However, a favorable consultation under Section 7 does not insure that a project will proceed without further risk under the Act.

Under present law, even if the Secretary of the Interior or the Secretary of Commerce has issued a "no jeopardy" opinion regarding a proposed project, the permit applicant proceeds at his peril. A favorable consultation under Section 7 does not free the applicant from the strict prohibitions of Section 9 of the Act. Section 9, which prohibits the "taking" of any endangered species, operates independently of Section 7. Under a literal reading of Section 9, an accidental taking of one egg or larva of an endangered species could be treated as a violation of Section 9, regardless of the outcome of the Section 7 consultation. The mere possibility that a court might interpret Section 9 in this manner may be enough to prevent the appplicant from proceeding at all with its project. In effect, the concern raised by Section 9 renders Section 7 procedures meaningless.

The Remedy

The remedy for this statutory contradiction would be to clarify the Act to provide that any action taken in accordance with an opinion rendered by the Secretary in a Section 7 consultation would be exempt from the prohibitions in Section 9. Later in my testimony I will suggest language that we believe would accomplish this goal.

Our Experience with the Act: The Montague Project

I am here today to describe an example of the problems caused by the lack of coordination between Section 7 and Section 9. This example is based upon a series of incidents that occurred when Northeast Utilities and other New England utilities were planning the construction of a nuclear power plant near the Connecticut River in Montague, Massachusetts.

Northeast Utilities had applied to the Nuclear Regulatory Commission ("NRC") under the Atomic Energy Act for construction permits for the plant. We had also applied to the Environmental Protection Agency ("EPA") under the Clean Water Act for a discharge permit and for approval of the location and design of the makeup water intake structure. Although the NRC nominally has jurisdiction over aquatic impacts under the National Environmental Policy Act, in practice it defers largely to EPA's analysis. Under procedures of the NRC which are designed to inform applicants as early as possible of the suitability of proposed nuclear sites, we had also applied to the NRC for an early "site suitability" ruling. We had hoped to obtain a definitive finding from all of the agencies having jurisdiction that the Montague site was an acceptable site from an environmental point of view.

The makeup water intake structure for the Montague plant was to be located on the Holyoke Pool of the Connecticut River. During our aquatic studies, it was determined that the Shortnose Sturgeon was present in the Holyoke Pool. This species has been on the endangered species list since 1967. However, the plant was to be built with cooling towers and other equipment which would employ state of the art technology to minimize impact on the river, and we believed that it was very unlikely that there would be any adverse effect on the Shortnose Sturgeon population.

Nevertheless, early in its review of our application under the Clean Water Act, EPA began to develop the troublesome position that brings us here today. While we disagree with the position taken by EPA in the Montague proceeding, we recognize that EPA's position was the product of a good-faith effort to administer a statute which, by its own terms, absolutely prohibits "takings."

The application was being reviewed by the Power Plant Review Group based at the EPA's Region I office in Boston. In 1977, the Power Plant Review Group sent the Montague applicants a letter containing the following statement:

> The Power Plant Review Group has recommended that EPA disallow any intake structure in the Holyoke Pool, pursuant to EPA's responsibilities under the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*, and the Endangered Species Act, 16 U.S.C. §1531 *et seq.*, because of the potential impact that an intake structure would have on the Shortnose Sturgeon. *Since this species is on the endangered list, EPA cannot issue a permit authorizing the taking of the species.* If the applicant opposes this recommendation, *a detailed showing of proof that no sturgeon (adult, larvae, or eggs) will be taken as a result of the operation of the proposed intake structure is required* (emphasis added).

This position was reiterated in a letter sent to the Montague applicants in 1978 which contained the following statement:

> Concerning the possibility of Shortnose Sturgeon mortalities, it is still the power plant review group's position that no intake structure can be allowed in the Holyoke pool because of predictable egg and larva entrainment. This question has been certified to EPA's Office of General Counsel for advice.

The "certification" referred to in the EPA letter was actually a request for an advisory ruling from EPA's Office of General Counsel in Washington on the applicability of the Act to EPA permit determinations. In a later letter to the Montague applicants, the Region I Office of EPA indicated that the question on which it was seeking the advisory ruling was as follows:

> Must EPA, in making 316(b) and other NPDES determinations for the Montague facility, a new source, refuse to license the facility at the proposed location if the Agency concludes that licensing the proposed activities will result in the taking of Shortnose Sturgeon, an endangered species? The issue is whether a predictable reduction in an endangered species caused by an intake structure constitutes a "taking" under the Endangered Species Act and further, whether the "taking" prohibition in the Act applies to EPA's permiting action here. I am requesting your opinion because such an interpretation has implications for siting of facilities other than the project we are presently reviewing.

To our knowledge, no formal advisory ruling was ever received from EPA's Office of General Counsel, although the Region I office apparently did receive preliminary informal advice that its position on Section 9 may have been somewhat extreme.

About the same time that this correspondence with EPA took place, the NRC and EPA initiated a Section 7 consultation with the National Marine Fisheries Service ("NMFS") to determine whether the operation of the Montague plant would jeopardize the continued existence of the Shortnose Sturgeon or result in the destruction or adverse modification of its critical habitat. However, by this time it was clear from discussions and correspondence with EPA that it had already drawn two conclusions. First, EPA had concluded that Section 9 of the Act constituted a "zero taking" rule which would prohibit the entrainment or impingement of any Shortnose Sturgeon eggs, larvae or adults by the Montague intake structure. Second, EPA had determined that it had serious doubts about whether it could issue any approvals under the Clean Water Act, regardless of the outcome of the Section 7 consultation, if the activity being authorized would result in "takings" which were prohibited under its strict reading of Section 9 of the Act.

Several months later, the consultation process with NMFS bogged down in a series of requests for burdensome studies. Those studies were not performed primarily because we believed that such expensive and time-consuming efforts could not be justified in light of EPA's position on Section 9. If EPA felt that Section 9 was a bar to the approval of our application under the Clean Water Act, the outcome of the Section 7 consultation was obviously irrelevant. The consultation was never completed.

The licensing effort for the Montague plant was finally suspended in mid-1978. There were a number of reasons for this suspension. These included financial constraints, a decline in the demand for power and difficulties in commencing a joint hearing between the NRC and the Massachusetts Energy Facilities Siting Council, as well as the problems which we had encountered in resolving the Shortnose Sturgeon issues. We believe that the uncertainty about the operation of Section 7 and Section 9 was a significant factor in our failure to obtain a ruling on the suitability of the Montague site.

The Montague plant was cancelled in 1980. Although the Montague site still remains a prime location for an electric generating station, its use for that purpose is severely limited due to the presence of the Shortnose Sturgeon and uncertainty about the application of the Act.

The Lessons of Montague

Looking back on the Montague experience, the positions taken by EPA in 1977 and 1978 are instructive for two reasons. First, EPA's interpretation of Section 9 requires an applicant to prove a negative. Because EPA read Section 9 as a "zero taking" rule, if we wanted EPA's approval under the Clean Water Act we had to demonstrate that we would never entrain a single egg or larva or impinge a single adult. Obviously, it is impossible to make such a showing.

Second, the EPA position rendered the Section 7 consultation process meaningless. EPA had serious doubts about whether it could approve an activity which would result in "takings" under its strict reading of Section 9. If EPA felt that it could not issue any approval due to Section 9 even if we had obtained a favorable Section 7 consultation, then the consultation would be a pointless ritual.

The Double Jeopardy Risk

Our problems with the Act transcend our experiences with EPA. The "double jeopardy" risk was our overriding concern. Even if we had obtained a "no jeopardy" opinion from NMFS in the Section 7 consultation, and even if EPA had approved our intake structure, and even if the NRC had issued a construction permit and later an operating license, Section 9 would have continued to haunt us. Once the plant was fully built and operational, at a cost in excess of two billion dollars, a private party might bring suit to enjoin the operation of the plant on the grounds that it would cause a violation of Section 9. We simply could not afford that risk.

This "double jeopardy" concern is not unfounded in light of the absolutist ruling of the U.S. Supreme Court in TVA v. Hill, 437 U.S. 153 (1978), the famous snail darter case. The Court there held that in considering whether to issue an injunction to enjoin a violation of Section 7, a balancing of costs and benefits is not permitted. The Court stated that Congress meant exactly what it said. The plain language of the Act prohibits federal action that would jeopardize the continued existence of an endangered species or result in the destruction of its critical habitat.

No subsequent case interpreting Section 7 or Section 9 has been decided by the Supreme Court. However, the language of Section 9 is framed in even more absolute terms than the language of Section 7. Accordingly, even if we obtain a favorable Section 7 consultation, we cannot be confident that, if a lawsuit were filed alleging a violation of Section 9, a court would balance the equities and refuse to enjoin the operation of a completed power plant.

ne Act Offers No Reasonable Alternative

There is no reasonable alternative course open to a utility faced with a Section 9 problem. The deepest fear is that a court might issue an injunction against the operation of a plant because an isolated or inadvertent "taking" had occurred in violation of Section 9. Even worse, an injunction might be issued, wrongly we believe, just because the utility couldn't prove that a Section 9 taking would not occur. With new large central station generating facilities costing billions of dollars, utilities simply are not able to assume such risks.

We have been told in discussions with NMFS that the government would not prosecute an alleged violation of Section 9 if an applicant had obtained a "no jeopardy" opinion under Section 7. We have also seen a memorandum prepared by the Associate Solicitor of the Department of the Interior which expresses the view that an implied exemption from Section 9 arises following the receipt of a "no jeopardy" opinion under Section 7.[1] While we commend these reasonable positions, reliance on a government interpretation or policy is not a sonable alternative for a utility which is considering a lti-billion dollar investment. A third party could go to ourt, despite the government's position, to seek the relief that even the government believes is inappropriate. Moreover, the government's position on these issues would not be binding on a court.

---

[1] See Memorandum dated December 30, 1981, from Associate Solicitor, Conservation and Wildlife, to Associate Director, Federal Assistance, Fish and Wildlife Service.

Another alternative would be to go through the exemption procedure added by the 1978 amendments to the Act. Following an unfavorable Section 7 consultation, an applicant can now apply for an exemption from the Endangered Species Committee. If the exemption is granted, any activity which is necessary to carry out the approved activity will also be exempt from the prohibition against taking in Section 9. (See Section 7(o) of the Act.) This provision helps to highlight one of the anomalies between Section 7 and Section 9 of the Act. Any activity for which a Section 7 exemption is granted is also exempt from Section 9. Yet, in order to apply for the Section 7 exemption, an applicant must first obtain an unfavorable Section 7 consultation. On the other hand, in cases where a favorable Section 7 consultation is obtained, there is no immunity whatsoever to Section 9. Congress could not have intended this contradictory result.

Furthermore, the exemption procedure is extremely burdensome and involves extremely strict standards. The exemption procedure takes place at three different levels, culminating in a ruling by a specially appointed, Cabinet-level committee. Only two projects have gone through this procedure, and only one was granted an exemption. No applicant can anticipate success.

The Prohibition Contained in Section 9 is Unnecessary Following Favorable Consultation

The prohibition in Section 9 is unnecessary in those situations in which a favorable Section 7 consultation has been obtained. The consultation process is sufficient to prevent the extinction of an endangered or threatened species or the destruction or adverse modification of its critical habitat. Section 9 only adds a heavier burden that may penalize an applicant which has complied in good faith with Section 7. An incidental and inadvertent taking will not threaten the survival of most endangered species. It may, however, needlessly penalize the owners of useful facilities and their customers.

Furthermore, under our proposal, where no Section 7 consultation has been obtained because there is no federal involvement in the activity in question, Section 9 would remain fully operative.

Conclusion

If the Secretary issues a "no jeopardy" opinion in connection with a proposed project, that project should be permitted to proceed without further risk under Section 9 of the Act. Similarly, if the Secretary suggests "reasonable and prudent alternatives" to the proposed course of action pursuant to Section 7(b) of the Act, and the applicant agrees to adopt one of those alternatives, the project should not be subject to further risk under Section 9 of the Act. We believe our proposed amendment meets these goals and would eliminate the inherent contradiction between Sections 7 and 9.

Accordingly, we propose that the present Section 7(o)[16 U.S.C. §1536(o)] of the Act be deleted and that the following be substituted in its place:

> Notwithstanding Sections 4(d) [16 U.S.C. §1533(d)] and 9(a) [16 U.S.C. §1538(a)] of the Act or any regulations promulgated pursuant to such sections, (i) any action for which an opinion has been rendered pursuant to Section 7(b)[16 U.S.C. §1536(b)] which concluded that such action is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of the critical habitat of such species, (ii) any action recommended by the Secretary pursuant to Section 7(b) [16 U.S.C. §1536(b)] as a reasonable and prudent alternative or (iii) any action for which an exemption is granted under Section 7(h)[16 U.S.C. §1536(h)] of this Act, shall not be considered a taking of any endangered or

> threatened species with respect to any activity which is necessary to carry out such action.

It should be noted that our proposed amendment merely builds on the exemption from Section 9 which already exists in Section 7(o) of the Act. Thus, our approach would allow the contradiction between Section 7 and Section 9 to be eliminated without requiring any changes in other parts of the Act.

Thank you for allowing me to testify here today.

NORTHEAST UTILITIES

A Summary of Significant Environmental Programs

Northeast Utilities and its subsidiary companies, The Connecticut Light and Power Company ("CL&P"), The Hartford Electric Light Company ("HELCO"), Western Massachusetts Electric Company ("WMECO"), and Holyoke Water Power Company ("Holyoke"), have long recognized the need for environmental awareness and responsibility.

Some examples of Northeast Utilities' accomplishments in environmental protection and in the propagation of fish and wildlife follow:

*Holyoke completed construction of the most successful upriver shad passage facility along the Atlantic seacoast in 1955 at Holyoke, Massachussetts. Holyoke had begun experimenting with methods to lift the American shad over the Holyoke Dam in the 1950s. After several experiments, a fish elevator was built that lifts the shad more than 50 feet, then releases them above the dam. Annual use of this facility has grown from 5,000 shad in 1955 to 347,000 shad in 1981. More than 300 Atlantic salmon were also lifted and captured at the Holyoke fishlift in 1981 by fisheries agencies. The salmon capture was especially significant as part of a federal program to restore historic salmon runs to the Connecticut River.

Holyoke was awarded the U.S. Department of Interior's Conservation Service Award in 1956 for the successful development of the Holyoke fishlift. This was the first time the Department of Interior's Conservation Service Award was given to a corporation.

*Northeast Utilities recently developed a system that assists American shad to migrate downstream at the Boatlock Station hydroelectric plant in Holyoke. This experimental system, which is the first of its kind in the United States, herds and diverts the shad around the Holyoke Dam.

*A three-fishladder complex was completed at Turners Falls, Massachusetts, in 1980. Northeast Utilities, in cooperation with state and regional fisheries agencies, built the complex, which opens an additional 30 miles of river to American shad and Atlantic salmon. The fish ladders permit shad and salmon to swim upstream in increments of about one foot at a time.

*Northeast Utilities has designed and developed the most sophisticated data acquisition network of any utility in the

United States. Meteorological towers record data every few seconds, 24 hours per day, on wind speed and direction, light intensity and sulfur dioxide levels at every major Northeast Utilities plant site. Underwater monitors track water temperature and pH levels. This data is fed by telephone lines into a computer at Northeast Utilities headquarters in Berlin, Connecticut, where it is used to insure compliance with federal and state agency requirements. Northeast Utilities was the first utility in the country to have a completely automated data gathering system.

*Long-term ecological monitoring has been underway at the Millstone Point nuclear power station on Long Island Sound since 1968. Independent research is carried out to study plankton, benthos, fish and terrestrial ecology. Northeast Utilities maintains a full-time staff of 28 scientists and technicians at the Millstone Point site to conduct these studies. Initiated by Northeast Utilities in 1968, these studies were incorporated as conditions of the plant's operating licenses and discharge permits in 1973.

*A unique fish barrier was constructed at the outlet of a thousand-foot discharge quarry at Millstone Point to minimize thermal stress on fishes. Northeast Utilities voluntarily developed and erected this "venetian blind" type barrier, which has proved very effective.

*Three special nesting platforms were constructed on the Millstone Point site over the past 10 years to protect and encourage the propagation of the American Osprey, which is a rare bird in the Northeast. Osprey were nesting on an old derrick at the former Millstone quarry site, and Northeast Utilities built the first platform as a substitute when the derrick was removed. The first nesting platform proved so popular, two more were built. Thirty-two of the 192 osprey known to have been born in Connecticut over the past 10 years were born in these nests.

*When Connecticut shoreline residents grew concerned over a spreading problem with eelgrass, a locally abundant sea grass, Northeast Utilities voluntarily awarded a research contract to the University of Connecticut to determine the cause. The study concluded that the problem was the result of natural phenomena, not the operation of the Millstone plant.

*A four-year research program to examine the potential benefits of waste heat in condenser cooling water was initiated in 1976. An experimental research facility was established at the Millstone plant to explore the use of the heated discharge for aquaculture, i.e., the farming of shellfish. Scallops had been a traditional harvest in the area. In response to local and state interest, laboratory rearing techniques for scallops were developed and seeding experiments were conducted.

*The winter flounder was also the subject of extensive Millstone Point studies. Northeast Utilities supported the development of a computer-based mathematical model designed to simulate the effect of the three Millstone units on the winter flounder. The model, completed under the direction of scientists at the University of Rhode Island, was one of the first to combine both hydrodynamic and life history factors in order to predict the changing effects on a species over the life of a power plant.

*An elaborate bioassay program has been established at Millstone Point using approved EPA procedures to investigate the short- and long-term effects of effluents on Long Island Sound organisms. Northeast Utilities initiated this program because it believed the results would be scientifically useful in the future. In fact, studies to date have shown that there is no short- or long-term toxicity associated with the Millstone Point discharge. No outside agency required the program.

*At the Connecticut Yankee atomic power station, Northeast Utilities undertook a milestone ecological study from 1965 to 1972 on the possible impacts of the power plant on the Connecticut River. The report focused on the impact of the thermal discharge on benthic organisms and resident and anadromous fishes. This study was the first in-depth exploration of the impact of a power plant on a river. It was chosen by the American Fisheries Society to be the subject of its first published monograph.

*Northeast Utilities owns and operates over 800 acres of recreational facilities at the Northfield Mountain Pumped Storage Project in Northfield, Massachusetts. Ten naturalists and rangers as well as seasonal assistants staff the facilities. Northfield provides approximately 25 miles of trails which can be used for cross country skiing, horseback riding or hiking. The cross country skiing program includes instruction, rental equipment, grooming and nordic ski patrol. Other activities include an interpretative river boat ride, camping at Bartons Cove or Mums Ferry and year round naturalist programs. This year, Northfield was host to the U.S. Olympic cross country ski team.

These studies and projects are only a portion of Northeast Utilities' accomplishments in the area of environmental protection.

STATEMENT OF
R. L. CARLTON, MANAGER, WILDLIFE AND NON-TIMBER
RESOURCES PROGRAMS
NATIONAL FOREST PRODUCTS ASSOCIATION
BEFORE THE SUBCOMMITTEE
ON ENVIRONMENTAL POLLUTION,
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS,
UNITED STATES SENATE
ON S. 2309 AND S. 2310
APRIL 22, 1982

Mr. Chairman and Members of the Subcommittee:

We appreciate this opportunity to give the Subcommittee the views of the forest products industry on S. 2309 and S. 2310, legislation to reauthorize the Endangered Species Act of 1973, as amended.

The National Forest Products Association (NFPA), headquartered in Washington, D.C., is a federation of 31 forest industry associations in addition to direct company members. Through its membership it represents more than 2,500 companies throughout the United States and Canada engaged in timber growing and in the manufacture and distribution of forest products.

The forest industry supports the concept that plants and animals should be protected from extinction resulting from the heedless acts of man. The Endangered Species Act was enacted as an effort to ensure that our nation's plant and animal resources were protected from extinction. We agree with this goal. However, we believe implementation of the Act has tended to neglect or unnecessarily conflict with other important national goals.

We have reviewed S. 2309 and S. 2310, and find that these bills do not address our concerns. In this statement and in the attachments to it, we are suggesting a number of amendments. We ask the Subcommittee to give them serious consideration in the legislation it approves. However, should the Subcommittee decide it cannot accept amendments along these lines, we would prefer a simple one year reauthorization approach.

Areas of particular concern to us include: (1) definition and uses of terms in the Act and the implementing regulations; (2) the linkage between biological findings of fact and decision-making; (3) the costs and disincentives present in the Act which tend to inhibit the protection of species and their habitats.

A. Definitions - several important terms should be redefined to clarify congressional intent and to reduce confusion.

1. "Critical Habitat" - as currently interpreted by the Fish and Wildlife Service, this term is far too inclusive. When Congress first developed the statutory definition, the emphasis was on discrete elements or sites

within the habitat occupied by the species at the time of listing which required special management and protection. We suggest that the definition either be reworded or that the report accompanying the reauthorization legislation include language to insure that implementation of the Act will be given the emphasis originally intended.

2. "Species" - at present, the term "species" is used to identify groups that vary from local populations which may be only a small part of a wider ranging grouping, to "full" species. We suggest that the term either be given its biological meaning or be dropped entirely, using the definitions of "endangered species" and "threatened species" to allow the listing of subspecific taxa when appropriate.

3. "Endangered Species" And "Threatened Species" - These definitions are the logical places to provide for the listing of subspecific taxa under appropriate conditions. The ability to list something less than the full species can provide a necessary and desirable degree of flexibility if used properly. We do not believe it necessary or wise to list at the specific level unless the entire species is endangered or threatened. However, listing below the specific level should be restricted to those instances where failure to list subspecific taxa

would result in listing of the species over its entire range or in the extirpation of subspecific groups which are isolated from other elements of the species. For example, we are concerned that at some point the Fish and Wildlife Service will honor a petition which split a species into many small subspecific units. In such a case relatively minor acts might affect one or more of the subunits. This effect could be used to justify the listing of the subunits and perhaps cover the entire species. Yet the species as a whole would never be in danger and might also be capable of re-invading the area occupied by subunits. Therefore these definitions should be changed to allow listing subspecific taxa only under the two circumstances we suggest.

4. "Take" - When Congress developed the Endangered Sepecies Act in 1973, two major causes for extinction were recognized. The first was the removal or reduction to possession of animals from a population, that is, the killing or capturing of individuals. The second was the elimination of populations through adverse modification or destruction of their habitats. Although bills were considered which would have combined resolution of both causes, i.e., by defining habitat modification or destruction as a form of "taking", the final decision was

to separate the approaches. Reduction to possession or removal of animals was to be resolved by outright prohibition of such activities. Elimination of populations through habitat modification or destruction was to be resolved by authorizing purchases of threatened habitats. We generally agree with this approach. However, the definition of "take" should be changed to insure that implementing agencies will hold to this concept. In addition we recommend changes in the language authorizing habitat acquisition to insure that the relatively small amount of money available for purchasing habitats for listed species be used to acquire those designated critical habitats most seriously threatened with modification or destruction.

B. Linking Of Biological Findings Of Fact And Decision Making - As the Act is currently written and implemented, there is a great deal of overlap between what should be biologically-oriented processes and procedures and those which should incorporate considerations other than biology. For example, the present listing process includes not only biological findings of fact on a species' status and its habitat requirements but also involves economic and political considerations. That is because the economic analysis currently required during evaluation of critical habitat and application of the Regulatory Reform Act and Executive Order 12291 to listing provide the only ways to balance welfare of the species with other concerns. Listing of a species automatically brings into play all of the restrictions of section 7 and the prohibitions of section 9.

We agree with those who suggest there should be greater separation between biological findings of fact and what follows. To that end, we are suggesting changes in Sections 4, 7, 9, and 11. These changes would make the listing process a separate, non-regulatory procedure, based strictly on biological consideration of a species' status and habitat requirements. However, before permanent protective measures were established, there should be a separate step for balancing of the welfare of the species with economic and other social concerns. This could be done by requiring the Secretary to design a protection plan through regulations which reflects a balancing of the needs of the species and other public programs. During the period of time between the listing of a species and the promulgation of final regulations, or up to one year after final listing, the species would receive complete protection to avoid actions that would affect the final protection scheme.

C. Costs And Disincentives - The costs of protecting endangered or threatened species and their habitats are often overlooked. Some of these costs can be quantified, others are difficult to assign. Those costs associated with unconscious decisions not to take an action or to postpone or shift an action because of possible complications arising from interactions with listed species or their habitats are often ignored. There is also the chilling effect which may result in conscious decisions to alter or fail to undertake activities because of possible problems arising from listed species. Other costs include those due to undertaking activities to favor listed species. Our suggested additions to the amendments being considered include language that would provide for a system of compensating private individuals or companies for those costs which are incurred in protecting species and habitats.

We encourage serious debate on this point. We are open to other ways of resolving this particular problem. We also believe that our suggested changes in Sections 4, 7, 9, and 11 will go far toward alleviating some of the disincentives that currently work against the best interests of listed species and their habitats by providing more options in the ways such species and habitats can be protected.

We do not object to the various amendments included in S. 2309. We believe our suggested changes will strengthen the bill.

Additionally, we suggest Congress provide for a study of implementation of the Act by an objective "third party" organization. Such a study should include assesments of the probable effects on fish, wildlife and plants (1) had the 1969 Endangered Species Act continued as the basic protection for such species and (2) had there been no Act at all. In addition there should be information on the costs of the Act to both public and private groups. Because of the importance of the results of such a study and because of the number of suggested changes offered to resolve concerns expressed, the Subcommittee needs more time to evaluate what should be done, and to act on amendments such as those we have suggested. If this is the case we recommend the Act simply be reauthorized for one year.

We appreciate this opportunity to express our concerns and to give our suggestions to resolve the issues. We offer our help in the Subcommittee's efforts to improve the Endangered Species Act of 1973.

National Forest Products Association
Suggested Changes To Language In S.2309 As Introduced

The following recommended changes in the current language of S. 2309 are keyed to the sections and paragraphs in that bill and not to those of the Act itself.

A. EXPERIMENTAL POPULATIONS

1. Section 2(a)(1) should be changed by having the new paragraph (7)(A) read: "any person authorized by the Secretary has transported and released outside the range occupied by the species at the time of the species' listing to further the conservation of that species pursuant to the Act;".

COMMENT: This change would insure that it is understood the range under consideration is that occupied by the species at the time of listing.

2. In Section 2(b)(3) the language of new paragraph (2) be changed to read: "Experimental populations shall be treated as non-listed populations and no critical habitat shall be designated for such populations: Provided, That, if the Secretary determines, on the basis of the best evidence available, that any experimental population is essential to the continued existence of a threatened or endangered species because such listed species is declining in numbers and is in imminent danger of extinction, he shall list such population as threatened

and shall issue such regulations as he deems necessary to provide for the conservation of such species: Provided, Further, all experimental populations shall, solely for the purposes of subsections 7(a)(2), 7(a)(3), and 7(c), of this Act, be treated as species proposed for listing under Section 4 of this Act.

COMMENT: The emphasis should be on those populations which might require the protection afforded by threatened status.

B. LISTING

A. In Section 4(6) the language in new paragraph (5) be changed by inserting after the phrase "endangered or threatened species" the words: "to designate critical habitat".

In addition, the end of this paragraph a new clause be inserted which would read: "(iii) shall give actual notice of the proposed regulation, including complete text of the regulation and any environmental assessment to local units of government in and adjacent to the range occupied by the species to be listed or critical habitat to be designated".

C. Further, section 4(6) at new clause (5)(F) should be changed in the first sentence by striking all after the wording "date of publication of" and inserting in lieu thereof: "proposed rulemaking, publish a final regulation".

COMMENT: A. The first change would allow consideration of critical habitat.

B. The second change would provide information to local units of government which might be affected by a listing or designation.

C. The final recommendation would clarify precisely when the time period is to begin.

C. EXEMPTION PROCESS

A. Section 5(b)(2) at new clause (C) should be changed by deleting everything after the word "committee" and inserting in lieu thereof a period and be further changed by deleting all of (D).

COMMENT: The change suggested in the bill would unnecessarily complicate what is already a rather complex procedure.

B. Section 5(c)(3) should be changed by omitting all of the suggested language.

COMMENT: This is too far sweeping a prohibition and allows no real balancing of other factors if the subject condition is found.

D. INTERAGENCY COOPERATION

Section 7 should be changed at (2) by inserting after the phrase "reasonable and prudent alternative" and before the semicolon the words: "and which has been accepted as the preferred action over the proposed action".

COMMENT: Technical

E. PROHIBITED ACTS - PENALTIES AND ENFORCEMENT

Delete section 9.

COMMENT: Given the language in subsections 11(g)(1)(A) and 11(g)(1)(B) of the current Act, it is not necessary since the subsections cited provide the Attorney General with the authority sought in this amendment.

F. ADDITIONAL SECTION 7 CHANGES

Should the subcommittee decide to amend section 7 basically as provided in S.2309 rather than as suggested in recommended additions to S. 2309, the following changes in section 7 are recommended:

1. Amend section 7(a) by adding a new paragraph: "(4) any private person not otherwise subject to the requirements of this section may request that the Secretary consult on any action that person believes may affect an endangered or threatened species or critical habitat so as to obtain from the Secretary an opinion whether the action is likely to jeopardize the continued existence of such species or result in adverse modification or destruction of a critical habitat, together with a summary of the information on which the opinion is based. Such consultation shall be concluded within 90 days after initiation or such other time period as may be mutually acceptable to both parties and the Secretary's opinion shall be provided promptly thereafter: Provided, However, That, the private person may require the process be halted at any time prior to the issuing of the Secretary's opinion."

2. Amend subsection 7(b) by adding a new paragraph: "(3) any private person seeking an opinion from the Secretary pursuant to subsection 7(a)(4) of this Act may conduct a biological assessment to identify any listed species which is likely to be affected by such action. Any such assessment shall be conducted in cooperation with the Secretary."

COMMENT: These two changes would make it possible for those who are not subject to section 7 to obtain a biological opinion for the purposes of receiving protection that would be conferred by the Subcommittee's amendments to section 7(o).

3. Amend subsection 7(d) by adding at the end thereof the following: "the Secretary shall delegate authority for consultation to other federal agencies upon his approval of standards and procedures developed by individual agencies to insure compliance with provisions of this Act. Delegation shall be accomplished through counterpart regulations."

COMMENT: This would allow those agencies the Secretary determines to have adequate in-house biological expertise to carry a part of the consultation burden that currently must be borne by the Secretary.

National Forest Products Association

Suggested Additions to S. 2309

(Section citations are to the Endangered Species Act of 1973)

These are suggestions for additional amendments to the Act for inclusion in S.2309

1. Amend section 3(1) by deletion.

Comment: No longer germane (see 29 below).

2. Amend section 3(6) by striking all after "range" and by adding the following; "the Secretary may consider a lower taxon an endangered species for the purposes of the Act if it can be shown that the entire species over its entire range would otherwise be listed but that only a portion of it needs the protection afforded by this Act or if the failure to list an isolated lower taxon would result in its extirpation without the probability of re-invasion by other elements of the species."

Comment: The current language is meaningless since by the time an insect species reached such depleted numbers as to be considered threatened with or in danger of extinction, it would no longer be an overwhelming and overriding risk to man. The suggested language would permit listing of taxa below the level of the species if there is a high degree of probability that something less than the entire species does not require the kind of protection afforded by the Act. It would prevent the wholesale listing of subspecific entities absent a showing of probable listing at the species level or a showing of extirpation of subspecies without probability of re-invasion by the species.

3. Amend section 3(12) by deletion.

Comment: No longer germane (see 29 below)

4. Amend section 3(16) by striking in its entirety and substituting the following:

"3(16) the term "species" means a group of physically similar organisms capable of interbreeding but generally incapable of producing fertile offspring through breeding with organisms outside this group."

Comment: The current definition is biologicaly meaningless. If there is need to provide for listing at taxonomic levels below the species, this could be done by appropriate amendment of the definitions for "endangered species" and "threatened species."

5. Amend section 3(19) by striking in its entirety and substituting the following:

"3(19) the term "take" means pursue, hunt, shoot, wound, kill, trap, or collect, or to attempt to engage in any such conduct, for the purpose of removing an animal or reducing it to possession. On federal lands the foregoing shall also apply to plants."

Comment: To most biologists, the term "take" as used in connection with wildlife, means to remove or reduce to possession. The term "harrass" does not belong in the definition; if harassment is to be prohibited, it should be considered separately. The term "harm", as it is defined at 50 CFR 17.3, is covered by use of the words "wound" and "kill".

The word "plant" is included since it is possible to remove or reduce plants to possession. It is not intended that the taking of plants be a prohibited act under the Act. However, federal agencies, under the requirements of section 7 of the Act, may need to prohibit taking of plants pursuant to a federal action.

6. Amend section 3(20) by inserting before the "." the following: "; the Secretary may consider a lower taxon a threatened species for the purposes of this Act if it can be shown that the entire species over its entire range would otherwise be listed but that only a portion of it needs the protection afforded by this Act or if the failure to list an isolated lower taxon would result in its being threatened with extirpation without the probability of re-invasion by other elements of the species"

Comment: See comment at 2 above.

B. LISTING

7. Amend section 4(a) in the first sentence by deleting "by regulation.", in the second sentence by deleting the first "regulation" and substitute "determination" and by deleting "by regulation, to the maximum extent prudent", and by adding a new subsection (3): "The determinations made and the lists constructed pursuant to direction in this section are not regulatory in nature and do not in themselves confer any protection except as provided in subsection (d) of this section."

8. Amend section 4(b) by deleting subsection (4) in its entirety.

9. Amend section 4(c) - in first sentence by deleting "by regulation"; in subsection (2) by deleting "under subsection 553(e) of title 5 United States Code"; and by deleting the last sentence of subsection (3).

10. Amend section 4(d) by deleting in its entirety; retitling as "Protective Measures" and substituting the following: "Whenever any species is listed and its critical habitat designated pursuant to subsection (c) of this section, the following protective measures shall apply for one year after publication of a notice of such listing and designation or until the Secretary shall issue regulations pursuant to subsection (e) of this section, whichever occurs first Provided, However, That, those species listed as endangered or threatened and those critical habitats designated when these amendments take effect, shall continue to receive the protection afforded by this subsection until regulations pursuant to this subsection have been published or for a period not to exceed five years, whichever occurs first:

(1) With respect to animals, it is unlawful for any person to -

(A) import into or export from the United States any such species,

(B) take any such species within the United States including its territorial seas unless the action resulting in such taking has received a "no jeopardy" opinion pursuant to subsection 4(d)(3);

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means, any species taken in violation of subparagraphs (B) and (C)

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce any such species;

(F) sell or offer for sale in interstate or federal commerce any such species; or

(G) violate any regulation pertaining to such species promugated by authority provided by this Act.

(2) With respect to plants, it is unlawful for any person to -

(A) import into or export from the United States any such species;

(B) deliver, receive, carry, transport, or ship in interstate or foreign commerce any such species;

(C) sell or offer for sale in interstate of foreign commerce any such species; or

(D) violate any regulation pertaining to such species promulgated pursuant to authority provided by this Act.

(3) Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by the agency is not likely to jeopardize the continued existence of any listed species or result in the adverse modification or destruction of any designated critical habitat. The Secretary shall delegate authority for consultation to other federal agencies upon his approval of standards and procedures. Delegation shall be through counterpart regulations."

11. Amend section 4(e) by deleting in its entirety.

12. Amend section 4(f) by renumbering as 4(e).

13. Amend section 4(e)(1) by deleting "and subsection (b) of this section." And by adding the following new sentence "such regulations shall be for the purpose of specifying the kinds and degrees of protection to be afforded each listed species and designated critical habitat in terms of alleviating the adverse effects of those specific factors in subsection 4(a)(1) of this Act which have led to listing and designation, shall be based on the best evidence available, and shall reflect the Secretary's

balancing of the economic and environmental benefits, costs and tradeoffs of protecting the species and its critical habitat with other national goals and priorities."

14. Amend section 4(e)(2)(b) by deleting "with respect to the determination and listing of endangered or threatened species and their critical habitats."

15. Amend section 4(f)(2)(B) 9(i)(II) by striking in its entirety and substituting the following:

> "4 (f)(2)(B) 9(i)(II) "A general notice of the regulation, including a summary of the text and a map of any proposed critical habitat, in a newspaper of general circulation in or adjacent to the occupied range of the species or the proposed critical habitat;"

> Comment: Provides better public notice for regulations not involving critical habitat.

16. Amend section 4(e)(2)(B) (i)(II) by delete "specifics" and substituting "is for the purpose of protecting."

17. Amend section 4(e)(2)(B)(iv)(I) by deleting "does not specify" and substituting "is not for the purpose of protecting".

18. Amend section 4(e)(2)(B)(iv)(II) by deleting "specifics" and substituting "is for the purpose of protecting."

19. Amend section 4 (e)(2)(C) by deleting ", subsection (b)(4) of this section,".

20. Amend section 4(e)(5) by deleting in its entirety.

21. Amend section 4(g) by renumbering as 4(f).

22. Amend section 4(h) by renumbering as 4 (g).

23. Amend section 4(g)(4) by deleting "(g)" and substituting "(h)".

C. INTERAGENCY COOPERATION

24. Amend section 7(a)(2) by deleting in its entirety.

25. Amend section 7(a)(3) by inserting "listed or" after first "species", by inserting designated or", after "habitat" and by deleting last sentence.

26. Amend section 7(b) by deleting "(a)(2)" and substituting "4(d)(3)" wherever the former appears.

27. Amend section 7(e)(2) deleting in its entirety.

28. Amend section 7(d) deleting "(a)(2)" and substituting "4(d)(3)" wherever the former appears.

29. Amend sections 7(e), 7(f), 7(g), 7(g), 7(h), 7(i), 7(k), 7(1), 7(m), 7(n), 7(o), 7(p), and 7(q) by deleting in their entireties.

D. PROHIBITED ACTS

30. Amend section 9(a) by deleting in its entirety.

31. Amend section 9(b)(1) by deleting "this" and after "section" the term "4(d)".

E. PENALTIES AND ENFORCEMENT

32. Amend section 11(a)(1) by deleting", and any person....violates,"; by deleting "subsection (a)(1)(A),... section 9 of"; and by deleting "any person who ... each such violation. Any person who ... each such violation."

33. Amend section 11 (b)(1) by deleting "knowingly" and inserting "willfully"; by deleting "subsection (a)(1)(A),... section 9 of"; and by deleting final sentence.

Comment: Changes 7-33 would make the listing process non- regulatory and base determinations of the status of a species and designation of critical habitat solely on biological considerations. They would require the Secretary to develop and issue regulations to confer protection based on biology, economics, sociology, etc. -- a balancing of the needs of the species with other national goals and priorities. Provision is made for protecting listed species and critical habitats prior to issuing of final regulations and for those species and habitats listed before passage of these amendments.

F. ACQUISITION

34. Amend section 5(a) by striking in its entirety and substituting the following:

"5(a) Program. - The Secretary, and the Secretary of Agriculture with respect to the National Forest System, shall establish and implement a program, the appropriate Secretary -

(1) shall utilize the land acquisition authority under the Fish and Wildlife Coordination Act, as amended, and the Migaratory Bird Conservation Act, as appropriate, in acquiring designated critical habitats;

(2) is authorized to accept donations, gifts or other voluntary offerings of lands, waters, or interest therein;

(3) is authorized to acquire by purchase from willing sellers, lands, waters or interests therein, which are within designated critical habitats, and such authority shall be in addition to any other land acquisition authority vested in him."

Comment: Places emphasis on acquisition of critical habitat which, given relative scarcity of funds for acquisition, should be the first priority in a habitat acquisition program for listed species.

G. COMPENSATION

35. Amend section 12 by striking in its entirety and substituting the following:

"Compensation for Financial Losses"

"12(a) The Secretary is authorized to compensate persons for financial loss when he determines such persons have suffered financial losses directly caused by requirements or prohibitions of this Act or of regulations promulgated pursuant to authority provided by this Act when such requirements or prohibitions create conditions whereby a person (i) must manage lands owned by him in a manner which eliminated financial gain which would otherwise accure if such land were managed in the absence of such requirements or prohibitions or (ii) is prevented from taking an animal or plant which is causing him economic damage.

(b) The Secretary shall issue such regulations as may be necessary to implement this section, including those which (i) prescribe the manner and form for applying for compensation; and (ii) describe the evidence required to substantiate the claim that loss was due to conditions described in subsection (a) of this section.

(c) The Secretary shall make the determinations required by this section within 60 days after receipt of an application filed in accordance with subsection (b)(i) of this section.

(d) The amount of compensation paid, pursuant to this section, shall be equal to the economic gain foregone or loss sustained.

(e) Compensation shall not be paid under this section unless application for such compensation is made (i) within one year after final regulations are issued pursuant to subsection (b)(i) of this section, (ii) within one year after final regulations are issued by the Secretary which establish requirements or prohibitions alleged to cause losses or (iii) within one year after being prohibited, pursuant to the Act, from undertaking an action whose prohibition is alleged to cause losses.

(f) The Secretary's determination shall be an agency final action for purposes of judicial review.

(g) Failure to compensate a person who the Secretary has determined has suffered economic loss under the terms of this section within one year of such determination shall be considered permission for that person to conduct the action causing economic loss without prosecution, injunction or penalty otherwise provided in this Act.

(h)There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.

Comment: Current language no longer germane. This new section would establish a procedure whereby a person who is injured because of requirements or prohibitions that might be construed as takings of private property may be compensated for losses.

BEFORE THE
SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION
OF THE
SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

STATEMENT OF
MICHAEL J. BEAN, ENVIRONMENTAL DEFENSE FUND

CONCERNING
S.2309, A BILL TO AMEND THE
ENDANGERED SPECIES ACT

APRIL 22, 1982

This testimony is presented on behalf of the organizations identified below* concerning S.2309, a bill to amend the Endangered Species Act. This testimony addresses all parts of that bill save Section 8, which pertains to the implementation of CITES and which was addressed by other witnesses earlier this week.

In general, we find the bill to be carefully crafted and responsive to the concerns voiced and documented at the December oversight hearings. We commend Senators Chafee, Mitchell, and Gorton for the obvious care they took to separate the legitimate concerns with the design and implementation of this Act from those which had no factual foundation. In that regard, we are particularly pleased that the bill rejects the extreme proposals presented by some who appeared before this subcommittee that would have eliminated all protection for certain "lower" life forms and for populations of such species as the bald eagle, the California sea otter, the grizzly bear and others. These proposals, like the proposals to weaken the duties imposed on federal agencies by Section 7 of the Act, are without basis in science or fact and have rightly been rejected.

---

*Environmental Defense Fund, Animal Protection Institute, Audubon Naturalist Society of the Central Atlantic States, Sierra Club, Natural Resources Defense Council, American Association of Zoological Parks and Aquariums, World Wildlife Fund-U.S., National Audubon Society, Green peace - U.S.A., Friends of the Earth, Society for Animal Protective Legislation, Center for Environmental Education, American Humane Association, Humane Society of the United States, Defenders of Wildlife

Though we are in general agreement with the proposals contained in this bill, there are several particulars in which we believe it could be improved. The remainder of this testimony addresses those.

1. The Proposed Amendments to the Listing Process Fail to Insure that Credible, Scientific Evaluations of the Status of Species Will Govern that Process.

The record of the oversight hearings in this subcommittee and in its House counterpart amply demonstrates that Section 4 of the Act, prescribing the process by which species are added to or removed from the threatened and endangered lists, must be substantially revised to insure that credible, scientific evaluations of the status of species govern those listing decisions. Since section 4 was amended in 1978, the listing process has ground virtually to a halt because factors other than objective, scientific evaluations of the biological status of species have been given paramount importance. A final determination of the biological status has been made for fewer than five percent of the species whose listing proposals were outstanding at the time of the 1978 amendments; critical habitats have been designated for fewer than one percent. In the first fifteen months of the current Administration, only one species, a tiny crustacean found only in the National Zoo here in Washington, has been added to either list. No others have even yet been proposed for listing.

When measured against the accelerating rate of endangerment and extinction described in the testimony of Drs. Wilson, Eisner, and Raven, this woeful record of inaction cries out for legislative correction. Regrettably, however, the proposed amendments to Section 4 contained in S.2309 fail to correct the fundamental problem that hobbles the listing process. That problem is that since 1978 the Act has mixed the roles of biology and economics in a way that is internally inconsistent and virtually unworkable.

In our view, Congress should recognize, and the Act should reflect, that there are two separate and quite distinct functions that must be performed. The first is to ascertain what species are in fact facing the threat of extinction. The second is to decide how much should be done to protect them and whether exceptions are warranted in particular cases. The former function should be based strictly upon an objective, scientific assessment of the biological status of the species in question. The latter, obviously, requires a balancing of short-term, economic interests against long-term, economic and other values. It is extremely important, however, that we keep these functions separate and not let our assessment of how much protection is desirable influence our determination of which species are in fact facing the threat of extinction.

Much of the delay and uncertainty that now accompanies the listing process arises from the fact that these two logically separate functions have been merged as a result of the 1978 amendments. Those amendments, though based in part on a GAO report which criticized the Fish and Wildlife Service for allowing economic -- and therefore political -- considerations to influence its listing decisions, actually make the listing process more vulnerable to such pressures.

Congress brought about this undesirable state as a result of two measures included in the 1978 amendments. The first required, insofar as prudent, that species not be listed unless their critical habitats were designated concurrently. The second requirement, however, was that before any critical habitat could be designated, the Secretary was required to consider the economic impacts of such designation and authorized to exclude areas from the critical habitat if the benefits of exclusion outweighed the benefits of designation. Even when critical habitat is not designated at the time of listing, the discretion the Secretary exercises when making that determination is apparently regarded as triggering the duty to perform economic analyses under Executive Order 12291.

If Congress intended, by these two requirements, to compel a balancing of short-term, economic interests against long-term, economic and other values at the time a species is initially listed, then one has to wonder why Congress went to such pains to design an elaborate mechanism for making the same trade-offs when considering requests for exemptions from the requirements of Section 7. Except for the few species that themselves have commercial value, the only economic impacts attributable to the listing of a species come about as a result of Section 7. Since Section 7 has a carefully constructed mechanism, including both stringent substantive standards and detailed procedural requirements, for balancing economic and other values, the balancing of these same values at the time of listing negates the very purpose of the exemption mechanism. It must also be emphasized that the time of listing is the least appropriate time for attempting the difficult task of balancing. At that time, the trade-offs are speculative and remote, at best. The Section 7 exemption process, on the other hand, occurs at the most opportune time, when decisionmakers are faced with a real conflict in which at least some of the costs and benefits are quantifiable.

In combination, these two requirements added in 1978 have all but destroyed the listing process. They have made it impossible for the previous Administration to list more than a handful of new species and made it possible for the current Administration to list essentially none. They have forced into actual practice a priority system for listing which gives highest priority to those species species least likely to benefit from the fact of listing, because they are least likely to interfere with any economic interest. This Administration's sole listed species, the crustacean found solely on the property of the National Zoo, is testament to that.

The common sense solution to the problem described above is to revise Section 4 so as to require that determinations of the status of species are based strictly upon objective, biological data and to insure that economic considerations are confined strictly to the Section 7 exemption process. The most direct way to do this is by eliminating the economic analysis requirement of Section 4(b)(4). Alternatively, eliminating the requirement for concurrent listing and critical habitat designation could produce the same beneficial result. Regrettably, S.2309 does neither, and is thus likely to perpetuate the coma in which the listing process now lies.

Rather then attack the cause of the malady afflicting the listing process, S.2309 treats its symptoms. For example, proposed Section 4(b)(2) of the Act would require the Secretary to review certain lists of species developed by scientific organizations and natural resource agencies and determine whether species from these lists should be proposed for listing under the Act. In our view, any species for which the Secretary has substantial, scientific information that it may be endangered or threatened should be proposed for listing as such. The bill provides, however, that the Secretary's only duty, upon determining that substantial scientific information exists that a species may be threatened or endangered, is to determine within a year thereafter whether to propose such species for listing. According to subcommittee staff, the intent of this provision is only to permit the Secretary to determine whether proposing such a species for listing is consistent with his priority review system published pursuant to Section 4(b)(3). No other consideration, according to staff, may influence the determination whether to propose the listing.

In our view, there is no potential conflict between adherence to a published priority review system and a duty to review certain lists and propose for protection those species for which substantial, scientific information exists that they may be threatened or endangered. No potential conflict exists because the Secretary's review of the lists developed by scientific organizations and natural resource organizations can clearly be carried out in a manner which parallels, and is therefore consistent with, the priority review system required by Section 4(h)(3). Accordingly, we recommend that the following language be substituted for the language immediately following "and shall" in proposed Section 4(b)(2):

> propose for listing, pursuant to paragraph (5) of this subsection, any such species, or any other species, for which he determines there is substantial scientific information that such species may be endangered or threatened.

The concern about a potential conflict between the priority review system of Section 4(h)(3) and a duty to propose for listing those species for which substantial, scientific information exists that they may be threatened or endangered arguably has some legitimacy when the species is the subject of a citizen petition pursuant to proposed Section 4(b)(3). The legitimacy of that concern requires that the priority system of Section 4(h)(3) be interpreted as a priority system for listing rather them for "review for listing". The latter is the language of the statute. However, even if the statute does not mean what its words plainly say, a better solution exists than the proposal to give the Secretary an undefined discretion whether or not to propose the species for listing. The preferable alternative is to require that the species listing be proposed, but subject to the express qualification that the timing of the proposal be consistent with Section 4(h)(3). Thus, the second sentence of proposed Section 4(b)(3) could be amended by substituting the following language for the language immediately following "he shall":

> propose, consistent with paragraph
> (3) of subsection (h) of this section,
> such addition or removal pursuant to
> paragraph (5) of this subsection.

It should be noted that even with this change, the Secretary would rarely, if ever, be justified in postponing the publication of a proposed listing once he has determined that substantial evidence exists that the species may be endangered or threatened. Since no proposals have been made in the past fifteen months, there is unlikely to be any valid basis for deferring the proposal of a species that satisfies the petition requirements.

The proposed requirement that a final determination of status be made within a fixed period after publication of a proposed listing is a definite improvement over the existing law which allows for the withdrawal of a listing proposal after two years without any final determination of its status. This change will reduce the uncertainty of industry as to its ultimate obligations by reducing the time in which the status of a species is unresolved. We also concur with the proposal to clarify the obligation to designate critical habitat concurrently with the listing of species. Proposed Section 4(a)(3) would require such concurrent designation "to the maximum extent prudent and determinable". For some species, the scientific information that the species is in fact endangered or threatened may be available long before evidence sufficient to delineate its critical habitat is available. The proposed amendment will allow the listing of such species within two years after they are proposed for listing even though critical habitat may not then be determinable. Failure to have developed information sufficient to designate critical habitat within the two year period after a listing proposal will thus not prevent the listing of the species.

A technical comment pertains to the proposed amendments to Sections 4(a)(2)(A),(B), and (C). These amendments were intended to provide a scheme for the promulgation of regulations pertaining to threatened species under the jurisdiction of the Secretary of Commerce parallel to the existing scheme for the listing of such species. Since the authority of the Secretary of Commerce to promulgate such regulations himself is clear under Section 4(d), it is unnecessary to require that the Secretary of the Interior publish those regulations for him as a ministerial duty.

A final technical comment pertains to the new requirement in proposed Section 4(b)(5)(D) that the Secretary publish a notice in newspapers of general circulation in the areas in which the species occurs with respect to each species listing proposal. This requirement should be clarified so as to limit it to the areas in the United States in which the species occurs. It should also be qualified by the addition of the language "insofar as practicable." Some species already listed, for example the bald eagle and the American alligator, occur over such a wide area that literal compliance with the newspaper notice requirement could be so prohibitively expensive and burdensome as to prevent any future change in their status.

2. The Proposed Amendments to the Section 7 Exemption Process Will Subject that Process to Increased Political Pressure at the Expense of its Neutrality and Objectivity.

In 1978 Congress amended Section 7 of the Act to provide a process whereby certain qualified federal actions otherwise subject to the duty not to jeopardize the continued existence of endangered species could be exempted from that requirement. That process was to be comprised of two distinct stages. The ultimate, decision-making stage was assigned to a committee of seven high-level officials, all presidential appointees. Despite the political composition of that committee, its power to grant or deny exemptions was not unbounded. Most importantly, the validity of its decisions could be tested against the administrative record compiled for it by a politically neutral "review board." The neutrality of the review board was to be assured by balancing the composition of its three members. One member was to be appointed by the Secretary whose biological opinion found the proposed action to conflict with the requirements of Section 7; one member was to be appointed from a list of nominees submitted by the Governor of the state in which the proposed action was to occur; the third and pivotal member was to be an administrative law judge selected by the Civil Service Commission.

In hearings before this subcommittee's House counterpart last month, the National Wildlife Federation suggested an amendment to streamline and expedite the exemption process by, among other things, eliminating the two political appointees from the review board and consolidating the functions of that board in the third, politically neutral member. The bill now before us, however, eliminates the only politically neutral member of the review board and assigns the functions of that board exclusively to the Secretary of the Interior or Commerce, depending upon whether a marine or terrestrial species is affected by the proposed action. In our judgment, that is a very serious mistake that will increase the political pressure on the exemption process and sacrifice whatever claims to neutrality and objectivity it now has.

It is no answer to our concerns that the final decisions of the Endangered Species Committee are judicially reviewable. The Committee's action will be judged against the record before it. If that record is itself the product of a partisan, rather than a neutral, compiler, then judicial review is likely to be meaningless.

In concluding, it bears emphasis that the major revision of the exemption process proposed in this bill arises from a vacuum of documented complaints about the existing process. If the existing exemption process has rarely been used, that means that federal agencies and their permitees or licensees are successfully finding ways to accomodate their proposed actions to the needs of endangered species rather than seeking exemptions. If by "streamlining" the exemption process we succeed only in reducing the incentive to find such means of accomodation, then we will have taken a major step backwards.

3. Federal Permit or License Applicants Should be Consulted about Extensions of the Section 7 Consultation Process, but Should not Have Veto Authority Over Such Extensions.

Section 6 of S.2309 would amend Section 7(b) of the Act to require that consultation between the Secretary and the federal action agency not be extended beyond the normal 90 days except with the concurrence of the permit or license applicant, when the federal action is the proposed issuance of a permit or license. Permit or license applicants clearly have an interest in the expeditious handling of the consultation process and in knowing when that process will be completed. That interest is served, however, by the proposed requirement that the Secretary specify the information needed to complete consultation and the date on which his biological opinion will be provided when consultation is extended beyond 90 days. The further requirement that the Secretary obtain the concurrence of the permit or license applicant prior to any extension is unnecessary to the interest of the applicant, may be unworkable, and is likely to result in the issuance of jeopardy opinions that could be avoided with more careful study. Accordingly, we recommend that the second sentence of Section 7(b) be amended by adding at the end thereof, "in consultation with any affected permit or license applicant."

4. The Proposed Amendment to Establish Special Measures for Experimental Populations Should be Clarified.

There is general agreement, we believe, that the reestablishment of new populations of threatened or endangered species in areas from which they have been extirpated may often benefit the conservation of those species. Efforts to reestablish new breeding populations of whooping cranes and peregrine falcons are among the best known of such endeavors. Where such efforts at reintroduction of listed species are appropriate, the Endangered Species Act should not discourage them.

The International Association of Fish and Wildlife Agencies ("IAFWA") testified before this subcommittee in December that the Act may discourage such efforts at reintroduction by the states because the protections that apply to the introduced specimens may "prevent the legitimate and entirely safe harvest of both resident and migratory populations" of other species. In our view, that result need not occur. In fact, as it now reads, the Act offers several means of insuring the sort of flexibility that the states seek and avoiding the consequences they fear.

The most simple means of using the existing provisions of the Act to encourage the reintroduction of listed species is through the permit authority of Section 10. That provision allows the Secretary to issue permits for otherwise prohibited activities if their purpose is to enhance the propagation or survival of the affected species. Thus, for example, the Secretary could issue to the state of New Mexico a permit for all activities in association with an effort to reintroduce an endangered fish into some river there. The permit could expressly authorize the incidental taking of introduced fish by fishermen licensed by New Mexico to fish for other species. Similarly, in its December testimony, the Western Regional Council testified that one of its member companies abandoned interest in establishing a new population of peregrine falcons on property it owned because of apprehension about the applicability of the Endangered Species Act. In fact, the concerns of that company could have been accomodated by the creative use of a Section 10 permit authorizing the occasional taking of the introduced birds incidental to the company's operations.

Still another way to accomodate the concerns about introduced populations is through the authority to list such populations separately as threatened species and to tailor the regulations applicable to them to meet their conservation needs. This approach is available, however, only for vertebrate wildlife since Congress in 1978 eliminated the authority to list separately populations of invertebrate wildlife.

Although we believe that adequate administrative means are available to resolve the identified problems with experimental populations, we are willing to support an amendment that addresses this matter directly. It is essential, however, that any such amendment actually reduce existing impediments to the establishment of experimental populations and not create new problems in the implementation of the Act. If revised in the ways suggested below, the proposed amendment in Section 2 of S.2309 should meet these criteria.

The proposed amendment defines "experimental populations" and establishes certain special restrictions applicable to them. A number of existing wildlife populations clearly meet this definition. Many others may or may not meet the definition, depending on how certain ambiguous terms in the definition (e.g. "current range", "authorized by the Secretary", "wholly separate" etc.) are understood. Since it is impossible to remove all ambiguity from the definition, we recommend that a process be established whereby existing populations can be determined to be experimental or non-experimental. Without such a process, there is a likelihood of conflict, controversy, and litigation over the question whether certain existing populations are subject to the full measure of protection afforded endangered and threatened species or the lesser protection afforded experimental populations. The process we seek need not be complex; it need only produce a result that is certain.

For similar reasons, we believe that the proposed amendment should specify a process whereby the Secretary determines that a particular experimental populations is "not essential to the continued existence of an endangered or threatened species." This determination is key, for if it is made, the protection afforded that population under Section 7 is greatly reduced. The only exception to that result is for populations occuring on National Wildlife Refuges. Because of the very limited development activity permitted in the National Park and Wilderness Systems, we recommend that this exception be broadened to include experimental populations occurring on any unit of the National Wildlife Refuge, National Park, or Wilderness Systems.

5. The Proposed Harmonization of Sections 7 and 9 Should be Revised so that Reasonably Avoidable Takings are Required to be Avoided, Even When an Activity has Been Found Consistent with Section 7.

In the oversight hearings, concern was expressed about a potential inconsistency between the taking prohibition of Section 9 and the duty of federal agencies to avoid activities which jeopardize the survival of endangered species under Section 7. The concern expressed was that a federal action might be found not to jeopardize the continued existence of an endangered species, as required by Section 7, yet still be prohibited under Section 9 because it would result in the "taking" of one or more individuals of that species. It should be noted at the outset that this represents an inconsistency only if one assumes that Section 7 was intended to set forth the full scope of obligations applicable to federal actions rather than a set of obligations additional to those imposed by other parts of the Act.

Section 7 of S.2309 is premised upon the above assumption of an inconsistency between Sections 7 and 9 of the Act. It eliminates this assumed inconsistency by totally exempting federal actions that are determined to be consistent with Section 7 from the taking prohibition of Section 9. This solution, however, creates an inconsistency of treatment between federal and non-federal actions that is potentially more serious than the inconsistency it seeks to remedy. The problem can be illustrated with a simple example. If the Forest Service receives a no-jeopardy opinion under Section 7 for the construction of a logging road in a National Forest, then, by virtue of the proposal in S.2309, any takings of endangered species incidental to that road construction are effectively exempted from Section 9. If a private timber company, on the other hand, constructs a substantially identical logging road in a forest that it owns, any takings incidental to that road construction will be subject to Section 9. The only explanation for these diametrically opposite outcomes is that the former activity was subject to the Section 7 consultation requirement while the latter was not. The impact upon the endangered species is identical.

There is a way in which this disparity of treatment between federal and non-federal activities can be avoided. Rather than give a blanket exemption from the Section 9 taking prohibition to federal actions that satisfy the requirements of Section 7, that exemption should be qualified to require that all reasonably avoidable takings be avoided. In practice, non-federal activities are apparently measured against a similar standard under Section 9 today, because not one example has yet been cited in which a private activity has been enjoined, or its proponent prosecuted, for an incidental taking that was not reasonably avoidable and that did not jeopardize the very survival of a species.

6. The Proposed Amendments to Section 6 Should be Adopted.

We support the proposal in Section 3 of S.2309 to increase the federal cost share of grants to the states under Section 6 of the Act. This increase is necessary to put the cost-sharing formula on an equal footing with the cost-sharing formulae under other conservation programs and thus to eliminate the existing disincentive for states to devote their financial resources to endangered species programs. We applaud as well the proposal to increase the authorization of appropriations to carry out Section 6 and encourage the Committee to make its best effort to secure those appropriations.

7. The Authorization of Appropriations to the Secretary of Agriculture Should be Amended to Encompass Enforcement with Respect to Both Importation and Exportation of Terrestrial Plants.

Section 11 of S.2309 amends Section 15 of the Act to provide an authorization of appropriations to the Secretary of Agriculture to carry out his responsibilities with respect to the importation of terrestrial plants. Since under Section 3(15) of the Act the Secretary of Agriculture has responsibilities with respect not only to importation of terrestrial plants but also to their exportation, we assume that the reference to exportation has been inadvertently omitted from this provision of the bill. We urge that it be restored.

8. The Bill Should Include a Provision to Stimulate Hemispheric Conservation through the Western Hemisphere Convention.

Two multilateral treaties are implemented by the Endangered Species Act: CITES and the Convention on Nature Protection and

Wildlife Preservation in the Western Hemisphere. The Western Hemisphere Convention was negotiated in Washington and opened for signature in 1940; it entered into force on May 1, 1942. The General Secretariat of the Organization of American States is the depository. Any member country of the OAS may become a party; to date, 17 countries have ratified.*

This Convention addresses the preservation of natural areas, wildlife, and plants. Parties are to establish national parks, national reserves, nature monuments, and strict wilderness reserves (Article II). Regarding the protection of species, the Convention parties agree to adopt, or to propose for adoption, laws for the protection of plants and animals outside protected areas (Article V, Par. 1) Parties are to adopt appropriate measures for the protection of migratory birds (Article VII) and to protect certain other specified animal and plant species (Article VIII). The parties generally agree to cooperate and to assist each other in accomplishing the objectives of the Convention. The OAS sponsored five technical meetings on implementation of the Convention in 1977, '78 and '79, culminating in a meeting on legal aspects of the treaty. These meetings revealed that the Convention has provided a useful framework for cooperation on nature conservation in the Americas.

---

*Argentina, Brazil, Costa Rica, Chile, Dominican Republic, Equador, El Salvador, Guatemala, Haiti, Mexico, Nicaragua, Panama, Peru, Trinidad and Tobago, United States of America, Uruguay and Venezuela.

However, the meetings have also made clear that most parties have not fully implemented the treaty and have not uniformly shared with other parties the actions which they have taken. The United States, for example, has not fully pursued the provisions of the Convention concerning the protection of plants and migratory birds. The only hemispheric neighbors with which we have negotiated migratory bird agreements are Mexico and Canada. The World Wildlife Fund-U.S. has for several years been investigating migratory birds in the New World tropics, in part as a contractor for the U.S. Fish and Wildlife Service. One-half of U.S. birds (322 species) winter in the neotropics and spend at least half their lives there. Some scientists believe that U.S. breeding populations of these migrants are declining and that in several cases the decline is probably caused by destruction of wintering habitat. Some number of these species is shared with every country south of the United States, including all parties to the Convention. The United States should cooperate with these countries to determine the conservation needs of shared migratory bird species and the desirability of more formal joint commitments to the conservation of these species. Unless we address this problem now, under the rubric of the Western Hemisphere Convention, we may later have to address it under other provisions of the Endangered Species Act. We must accept the biological reality that "our" migratory birds constitute an internationally shared resource that can only be protected through international cooperation in policy formulation, research and management.

We believe this Committee should take several immediate steps to improve implementation of the Western Hemisphere Convention. First, the Secretary of the Interior and the Secretary of State should be directed to submit to the Congress a report describing the status of U.S. actions to implement the Convention and identifying additional actions to comply more fully with our obligations, including those concerning the conservation of migratory birds as discussed previously. These proposals should also address the recommendations of the five technical meetings and should include specific budgetary commitments.

The President's recently unveiled "Caribbean Plan" will commit the United States to the development of the Caribbean basin nations of the Western Hemisphere. The recommendations we suggest, attached hereto in the form of a proposed amendment to the Endangered Species Act, should facilitate the integration of conservation and development in this important region.

RECOMMENDED AMENDMENTS TO SECTION 8A(e)
OF THE ENDANGERED SPECIES ACT OF 1973

Subsection 8A(e) of the Act is amended to read as follows:

WILDLIFE PRESERVATION IN WESTERN HEMISPHERE -- (1) The Secretary of the Interior, in cooperation with the Secretary of State shall act on behalf of and represent the United States in all regards as required by the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere (56 Stat. 1354, T.S. 981). In the discharge of these responsibilities, the Secretaries of the Interior and State shall consult with the Secretaries of Agriculture and Commerce and the heads of other agencies with respect to matters relating to or affecting their areas of responsibility.

(2) The Secretary of the Interior and the Secretary of State shall, in cooperation with the contracting parties of the Western Hemisphere convention and, to the extent feasible and appropriate, with participation of State agencies, take such steps as are necessary to implement that convention. Such steps shall include, but not be limited to --

(A) cooperation with contracting parties and international organizations for the purpose of developing personnel resources and programs that will facilitate implementation of the Western Hemisphere convention;

(B) identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend, and the implementation of cooperative measures to ensure that such species will not become endangered or threatened;

(C) identification of measures that are necessary and appropriate to implement those provisions of the Western Hemisphere convention which address the protection of wild plants; and

(D) encouraging nations of the Western Hemisphere that are not now parties to the Western Hemisphere convention to become parties

(3) No later than September 30, 1985, the Secretaries of the Interior and State shall submit a report to Congress describing those steps taken in accordance with the requirements of this subsection and identifying the principal remaining actions yet necessary for comprehensive and effective implementation of the Western Hemisphere convention.

(4) Nothing in this subsection shall affect in any manner the authority of any state with respect to the management of resident species within such state.

**AMERICAN
MINING
CONGRESS**
FOUNDED 1897
SUITE 300
1920 N STREET NW
WASHINGTON
DC 20036
202/861•2800
TWX 710•822•0126
J. ALLEN OVERTON JR.
PRESIDENT

Statement of the

AMERICAN MINING CONGRESS

Oversight Hearings on the Endangered Species Act
(PL 93-205)

Before the

Subcommittee on Environmental Pollution

Committee on Environment and Public Works

United States Senate

Washington, D.C.
April 22, 1982

Mr. Chairman and Members of the Subcommittee:

We appreciate the opportunity to present this testimony on behalf of the American Mining Congress which is a national trade association consisting of companies producing most of America's metals, coal and industrial and agricultural minerals, manufacturers of mining and mineral processing equipment and supplies, and engineering and consulting firms and financial institutions that serve the mining industry. My name is Jerry L. Haggard from the law firm of Evans, Kitchel & Jenckes, P.C., Phoenix, Arizona, and a member of the Public Lands Committee of the American Mining Congress.

We commend you, Mr. Chairman, and members of this subcommittee for holding these hearings and for introducing legislation in recognition of the fact that problems do exist in the Endangered Species Act of 1973. Being responsive to your request, we will address that legislation (S. 2309) specifically and we will also identify and suggest solutions to these additional problems which are being experienced and which can be anticipated in the operation of the Act.

The basic framework for the Endangered Species Act was passed in 1973. As with much legislation of the 1970's dealing with wildlife, forests and other environmental resources, the understandable desire to protect those values tends sometimes to produce legislation with inflexible requirements which disregard other important national needs. The American Mining Congress supports the efforts to protect those values by reasonable means which also allow the fulfillment of other national priorities and goals. For this reason we can support the purposes and policy stated in the Endangered Species Act to "conserve" endangered and threatened species ecosystems and for federal agencies to further that purpose.

However, while establishing a policy of conservation, much of the Act mandates absolute preservation. It is for this reason that since its passage in 1973, there have been more than a dozen amendments to the Act making special exceptions for a variety of matters from allowing the completion of the $120 million Tellico Dam to allowing an individual to retrieve a narwhal ivory tusk cane. However, this series of patchwork amendments has not yet dealt with the basic problems of the Act which cause the special exemption amendments to be necessary.

Unfortunately, proponents of retaining the Act as it is argue the necessity to prevent the extinction of species and suggest that those who propose even reasonable modifications to the Act favor, or are insensitive toward, the extinction of species. These arguments and suggestions are specious. The American Mining Congress does not oppose the use of the Act to prevent the extinction of species. We do oppose the misuse of the Act to prevent the development of needed resources which does not involve even the risk of species extinction.

We have attached to this statement a set of amendments which the American Mining Congress urges be adopted. These amendments and other conforming amendments center around four areas:

1. Section 7 prohibitions and exemption process.
2. Listing of species.
3. Critical habitat.
4. Recovery and translocation of species.

You will note that these subjects are essentially the same as those in S. 2309, so we will discuss both the amendments proposed in that legislation and our recommendations at the same time.

Section 7 Provisions.

When the Endangered Species Act was passed in 1973, Section 7 was a short provision (13 lines) entitled "Interagency Cooperation" which grew to become the most controversial provision of the statute. This section provided (and still provides) that all federal agencies shall insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of any endangered or threatened species or result in the destruction or modification of their habitat. The literal inflexibility of this provision caused courts to decide that no other objectives--not personal hardship relief, economics, energy conservation or other national policies, could be carried out by federal agencies if the action would jeopardize a species or adversely modify its habitat.

This section received nationwide attention when it was used to block the completion of the Tellico Dam Project after other attempts failed to block the project under the National Environmental Policy Act, the National Historic Preservation Act, the Federal Water Pollution Control Act and the Flood Control Act of 1936. As a result of this litigation, Section 7 was amended in 1978, but the absolute prohibitive language described above remained. What was added to Section 7 were eight pages of statute describing a lengthy and complex process purporting to provide for a special exemption after the original provisions of the Section have halted all activities of a project. One of the merits of S. 2309 is that it would reduce some of this length and complexity.

During these hearings, you will be told that the Section 7 exemption process is not a problem because not many developments have been stopped by following that process. The reason not many developments have been stopped must be readily apparent to anyone who has read Section 7 and its supplementing regulations. The process involves four levels of review ending with a board of seven Presidential Cabinet members who may approve an exemption by not less than a five to two vote. There are time limits for only some of the steps in the exemption process. The total time allowed for the nine steps which have time limits, from the commencement of the process to a possible exemption, is 810 days--more than two years. This does not include the time to follow more than six other steps in the process which have no time limits and this does not allow for any of the time which may be taken by judicial review at three separate stages in the process. The Fish and Wildlife Service has estimated that it would take three years to render a biological opinion which is only one of the first steps of the process.

It is no wonder why the Section 7 exemption process has not stopped many developments. The only two proposed developments which have completed the exemption process (Tellico and Grayrocks), were ones required to do so by the statute which also placed a ninety-day limit on the process. The nature of these two projects which endured the exemption process is also significant. Most land developments are of a nature which allow alternatives in their site locations and present the opportunity to avoid the exemption process simply by choosing another site. Tellico and Grayrocks dams, however, were largely completed and locked to a specific site before the endangered species issue arose, causing there to be no alternative to the exemption process. Mineral developments are of the same character. An ore body and mine site processing facilities cannot be moved to another location. Therefore, a mine development impacting an endangered species or its habitat must either undergo the exemption process or be abandoned. If one of the American Mining Congress member mining companies, having invested in a several hundred million dollar development, were required to suspend operations for the exemption process, the results would likely be disastrous.

Section 7 places every proposed action which might result only in a slight adverse modification of an insignificant part of a critical habitat in the same posture as if the action would certainly exterminate a species if it proceeded. It is an inefficient use of resources and properly considered as overkill to treat all situations as the most extreme. Therefore, the two basic changes which are necessary for Section 7 are to apply a standard of significance to the harm which might be caused to a species or its habitat before the exemption process is imposed and to streamline the process once it is imposed.

We are gratified that S. 2309 addresses the cumbersome Section 7 process. This legislation would replace the Review Board (one of the four levels of review) with the Secretary of the Interior, would reduce the time for those steps having time limits from 810 days to 690 days and would possibly eliminate one of the three opportunities for court suit. However, this would still leave the time for the steps having time limits to a little less than two years plus the time required for the six steps without time limits plus the time which may be required for two or three judicial reviews. The bill also does not remedy the problem of imposing the process on activities which do not cause significant harm to a species or habitat.

One change we urge in Section 7 would create a simplified but effective system allowing the federal agency responsible for the proposed action, with the assistance of the Fish and Wildlife Service, to exercise its own judgment to determine the effect of its action on a species or habitat, to weigh that effect with the benefits of its action, and to mitigate any adverse effects. This parallels closely the observations made recently by the Court in Cabinet Mountains Wilderness v. Peterson, 510 F.Supp. 1186 (D.C. D.C. 1981):

> "[A] federal judge sitting in Washington, D.C. is asked to speculate on whether there are any grizzly bears in a portion of Montana and whether holes drilled into a mountainside will frighten those bears away. That is not a task judges are equipped to perform, and, in any event, it is not a task they should perform. Congress has established agencies and prescribed procedures for resolving these questions, and all that a court can do is to make certain that the agencies take their responsibilities seriously and perform them conscientiously."

Mr. Chairman, we ask that you consider whether a board of Cabinet Officers sitting in Washington, D.C. is equipped any better than a judge to perform this task.

Another of our recommendations is to add a standard of significance to the extent of jeopardy which could be caused to a species and to the extent of adverse modification which could be caused to a critical habitat. The Section 7 provisions would not apply if an agency insures that its action is not likely to significantly jeopardize a species or result in a significant adverse modification to a critical habitat.

There is an additional problem with Section 7 in that it may be applied even to species which are not endangered or threatened if that species resembles in appearance an endangered or threatened species so closely that enforcement personnel would have difficulty in differentiating between the species. Because of the careful review provisions under our proposed amendments to Section 7, ample opportunity is provided to distinguish between listed and similar species, and confusion should not occur. Therefore, we believe similar appearance species should not be subject to Section 7 even though they could by regulation be subjected to the taking provisions of Section 9.

Finally, if the existing exemption process is to be retained in any of its present form, we urge that it at least be limited to those severe cases in which there is a serious likelihood that the proposed action could risk the extinction of a species.

Listing of Species.

A second area in which we urge modifications be made is in the listing of species. The present statute provides that a species may be termed endangered if it is in danger of extinction, or threatened if it is likely to become endangered, throughout all or a significant part of its range. This allows a species to be listed as endangered or threatened in some geographic areas even though it may be abundant in other geographic areas. An example of this is the grizzly bear which is listed as threatened in the 48 coterminous states but is unprotected in Canada and Alaska and is even abundant enough in northwestern Montana that hunting the grizzly is allowed. A similar situation exists with the gray wolf, which is listed as endangered, but the killing of which is allowed in Minnesota.

Almost every species has adapted to certain climates, latitudes and altitudes and, while abundant in their central area, their population may grade to zero in other areas. Some people do consider it aesthetically desirable to increase the populations of these species in these fringe areas. But that is not, and should not be, the goal to which the severe strictures of the Endangered Species Act are directed. The goal should be to prevent the extinction or danger of extinction of these species, not to apply severe restrictions (which conflict with other national needs) to fringe areas in order to increase populations in those areas.

Another area to which consideration should be given is limiting the listing of species of lower forms or less significant forms of life. We realize that this concept is objectionable to some in the scientific community. And we realize also that ideally, and strictly from the scientific point of view, it may be desirable to protect every living organism including the lowest forms of life. But we must begin to realize that our government cannot do everything everyone asks it to do even if it has merit. It must be recognized that financial and labor resources are limited. Once that is recognized, the conclusion must be that priorities must be established so those limited resources may be directed to the areas where they will do the most good. A study prepared for the Department of the Interior last year by Resources Planning Associates recognized this problem and suggested a method of judging the importance of species in allocating budgets. Although we have not proposed language to accomplish this, we urge that a similar system be applied to the determination of what species should be listed.

Critical Habitat.

We believe that revisions should be made in the system for designating and managing critical habitats. Prior to the 1978 amendments, testimony revealed that the public notice system for proposed listings of species was not effective because critical habitats for those species were not disclosed to allow local governments and the public to know whether the listing would impact their area. The 1978 amendments required, "to the maximum extent prudent" the critical habitat be published with the notice of the species listing. The committee and conference reports for the 1978 amendments clearly directed that the Secretary will, in most cases, give public notice of the critical habitat at the time a species is listed and the committee observed it would be rare instances in which critical habitats would not be included in the public notice. Instead, the practice has been that only in rare instances are the critical habitats revealed. Since the 1978 amendments became effective, only 15 critical habitats have been identified for the 103 species which have been listed. The revisions which S. 2309 would make to Section 4 of the Act would perpetuate this problem. The amendments we propose would correct the problem.

Recovery and Translocation Programs

S. 2309 provides for the creation of experimental populations of endangered or threatened species. The American Mining Congress favors a species recovery and translocation program designed to increase populations of endangered and threatened species with the objective of increasing their populations to allow delisting. However, many have legitimate concerns that translocations of listed species will result in the creation of additional critical habitats with the attendant restrictions on resource uses. This concern is heightened by the provisions of S. 2309. The translocation of species under those proposed amendments can be expected to result in the creation of new critical habitats and to impose the restrictions of Section 7 on activities in those new host areas. Additionally, S. 2309 has no provisions for notifying local residents and governments of a proposed creation of experimental populations in their areas. Standards should be included in the Act which would guide the translocation of species to areas in which interference with other activities would be unlikely. The amendments the American Mining Congress has proposed for transplanting species in other areas would not allow those areas to be designated as critical habitats or allow the strictures of Section 7 to apply to those areas.

Mr. Chairman, we urge your committee to recognize the serious threat which the Endangered Species Act and its administrative system pose to the orderly development of the nation's water and mineral resources even if it can be assumed that this threat is limited to only a few, albeit major, projects. The opportunity for abuse of the system has been demonstrated. We recognize that a rational system which can minimize harm to endangered or threatened species and their habitats is a desired national goal. However, this goal must be balanced with other equally important goals which the United States must carry out. We urge your committee to give serious consideration to and adopt the amendments which we have attached to this statement.

Thank you for your attention and for the opportunity of the American Mining Congress to present to this Subcommittee these changes which should be made in the Endangered Species Act of 1973.

PROPOSED AMENDMENTS TO THE ENDANGERED SPECIES ACT OF 1973

PRESENT

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled That this Act may be cited as the "Endangered Species Act of 1973".

TABLE OF CONTENTS

Sec. 2. Findings, purposes, and policy
Sec. 3. Definitions
Sec. 4. Determination of endangered species and threatened species
Sec. 5. Land acquisition
Sec. 6. Cooperation with the States
Sec. 7. Interagency cooperation
Sec. 8. International cooperation
Sec. 8A. Convention implementation
Sec. 9. Prohibited acts
Sec. 10. Exceptions
Sec. 11. Penalties and enforcement
Sec. 12. Endangered plants
Sec. 13. Conforming amendments
Sec. 14. Repealer
Sec. 15. Authorization of appropriations.
Sec. 16. Effective date.
Sec. 17. Marine Mammal Protection Act of 1972.

PROPOSED

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled That this Act may be cited as the "Endangered Species Act of 1973".

TABLE OF CONTENTS

Sec. 2. Findings, purposes, and policy
Sec. 3. Definitions
Sec. 4. Determination of endangered species and threatened species
Sec. 5. Land acquisition
Sec. 6. Cooperation with the States
Sec. 7. Interagency cooperation
Sec. 8. International cooperation
Sec. 8A. Convention implementation
Sec. 9. Prohibited acts
Sec. 10. Exceptions
Sec. 11. Penalties and enforcement
Sec. 12. Endangered plants
Sec. 13. Conforming amendments
Sec. 14. Repealer
Sec. 15. Authorization of appropriations.
Sec. 16. Effective date.
Sec. 17. Marine Mammal Protection Act of 1972

§ 2(a)(1)-(5) No change.

(6) the economic and social benefits of projects affected by this Act be given consideration in the decision making process to protect endangered and threatened species.

(b) PURPOSES — The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(b) PURPOSES. - The purposes of this Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to the extent that such conservation is consistent with other national interests, to provide a program for the conservation of such endangered species and threatened species, and to take such prudent and reasonable steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

§ 2(c) No change.

§ 3(1), (2) No change.

(3) The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

§ 3(4) No change.

(5)(A) The term 'critical habitat' for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection, and

(3) The terms "conserve", "conserving", and "conservation" mean to use and the use of all prudent and reasonable methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and regulated taking.

(5) (A) The term "critical habitat" for a threatened or endangered species means -

(i) the specific bounded areas within the geographic area occupied naturally by the species, at the time it is listed and published in the Federal Register in accordance with the provisions of section 4 of this Act, ~~on which are found those physical or biological features~~ that are needed for critical life stages which are (I) essential to the ~~conservation~~ survival and continued existence of the species and (II) which may require special management considerations

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

[(5) added by PL 95-632]

(6) The term "endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this Act would present an overwhelming and overriding risk to man.

§ 3(7) No change.

or protection; and

(ii) specific bounded areas outside the geographic area occupied naturally by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the ~~conservation~~ continued existence of the species.

(B) Critical habitat ~~may~~ will be established and published in the Federal Register for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include (i) the entire geographical area which can be occupied by the threatened or endangered species; (ii) the area occupied by the species historically but not occupied in accordance with the provisions of section 4(b)(4)(i) of this Act; or (iii) the area occupied by experimental populations established through experimental technology or mitigation activities pursuant to section 4(b)(4)(ii) and section 7 of this Act.

(6) The term "endangered species" means any species which is in danger of extinction throughout its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this Act would present an overwhelming and overriding risk to man. If the numbers of the species are adequate in one part of their natural range, but rare only in certain other parts of their natural range, such species shall not be deemed endangered.

§ 3 (8) through (15) No change.

(16) The term 'species' includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.

[(16) amended by PL 95-632]

(16)The term "species" means a group of physically similar organisms capable of interbreeding but generally incapable of producing fertile offspring through breeding with organisms outside this group.

"The term species does not include any subspecies or variety of fish, wildlife, or plants."

§ 3 (17), (18) No change.

(19) The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct

(20) The term "threatened species" means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range

§ 3 (21) No change.

(19) The term "take" means pursue, hunt, shoot, wound, kill, trap, or collect, or to attempt to engage in any such conduct, for the purpose of removing an animal or plant or reducing it to possession.

(20) The term "threatened species" means any species which is likely to become an endangered species within the foreseeable future throughout its range. If the members of the species are adequate in one part of their natural range, but rare only in certain other parts of their natural range, such species shall not be deemed threatened.

DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

SEC. 4. (a) GENERAL. — (1) The Secretary shall by regulation determine whether any species is an endangered species or a threatened species because of any of the following factors:

(1) the present or threatened destruction, modification, or curtailment of its habitat or range;

(2) overutilization for commercial, sporting, scientific, or educational purposes;

(3) disease or predation;

(4) the inadequacy of existing regulatory mechanisms; or

(5) other natural or manmade factors affecting its continued existence.

At the time any such regulation is proposed, the Secretary shall also by regulation, to the maximum extent prudent, specify any habitat of such species which is then considered to be critical habitat. The requirement of the preceding sentence shall not apply with respect to any species which was listed prior to enactment of the Endangered Species Act Amendments of 1978.

§ 4(a)(2) No change.

(b) BASIS FOR DETERMINATIONS. — (1) The Secretary shall make determinations required by subsection (a) of this section on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after consultation, as appropriate, with the affected States, interested persons and organizations, other interested Federal agencies, and, in cooperation with the Secretary of State, with the country or countries in which the species concerned is normally found or whose citizens harvest such species on the high seas, except that in any case in which such determinations involve resident species of fish or wildlife, the

DETERMINATION OF ENDANGERED SPECIES AND THREATENED SPECIES

SEC. 4. (a) GENERAL. - (1) The Secretary shall by regulation determine whether any species is an endangered species or a threatened species because of any of the following factors:

(1) the present or threatened destruction, modification, or curtailment of its habitat or range due to human activities;

(2) overutilization for commercial, sporting, scientific, or educational purposes;

(3) Other manmade factors affecting its continued existence.

At the time any such regulation is proposed, the Secretary shall also by regulation, ~~to the maximum extent prudent specify~~ designate any specific habitat of such species which is then considered by best available scientific data to be critical habitat.

The Secretary shall, within two years after the effective date of this Statute, specify the critical habitat of any species listed prior to the effective date of this Statute."

Secretary of the Interior may not add such species to, or remove such species from, any list published pursuant to subsection (c) of this section, unless the Secretary has first—

[(b) amended by PL 96-159]

(A) published notice in the Federal Register and notified the Governor of each State within which such species is then known to occur that such action is contemplated

(B) allowed each such State 90 days after notification to submit its comments and recommendations, except to the extent that such period may be shortened by agreement between the Secretary and the Governor or Governors concerned; and

(C) published in the Federal Register a summary of all comments and recommendations received by him which relate to such proposed action

Secretary of the Interior may not add such species to, or remove such species from, any list published pursuant to subsection (c) of this section, unless the Secretary has first—

[(b) amended by PL 96-159]

(A) published notice in the Federal Register and notified the Governor of each State within which such species is then known to occur that such action is contemplated

---

(B) allowed each such State ~~90~~ 60 days after notification to submit its comments and recommendations, except to the extent that such period may be shortened by agreement between the Secretary and the Governor or Governors concerned; and

(C) published in the Federal Register a summary of all comments and recommendations received by him which relate to such proposed action.

(D) published in the Federal Register the specific critical habitat(s) in each state within which such species is then known to occur.

§ 4(b)(2), (3) No change.

(4) In determining the critical habitat of any endangered or threatened species, the Secretary shall consider the economic impact, and any other relevant impacts, of specifying any particular area as critical habitat, and he may exclude any such area from the critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species.
[(4) added by PL 95-632]

(4) In determining the critical habitat of any endangered or threatened species, the Secretary shall consider the economic impact, and any other relevant impacts, of specifying any particular areas as critical habitat, and he may shall exclude any such area from the critical habitat (i) if he determines that the benefits of such exclusion outweigh the benefits specifying the area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species; (ii) if the area was not previously occupied by an endangered species or threatened species but became occupied by an experimental population through, but not limited to, experimental technologies such as translocation and artificial propagation and the results of mitigation activities.

§ 4(c)(1), (2), (3) No change.

(4) The Secretary shall —

(A) conduct, at least once every five years, a review of all species included in a list which is published pursuant to paragraph (1) and which is in effect at the time of such review; and

(B) determine on the basis of such review whether any such species should—

(i) be removed from such list;

(ii) be changed in status from an endangered species to a threatened species; or

(iii) be changed in status from a threatened species to an endangered species.

Each determination under subparagraph (B) shall be made in accordance with the provisions of subsections (a) and (b).

[4(c) revoked by PL 95-632]

(d) PROTECTIVE REGULATIONS. — Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2), in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 6(c) of this Act only to the extent that such regulations have also been adopted by such State

(4) The Secretary shall -

(A) conduct, at least once every ~~five~~ three years, a review of all species included in a list which is published pursuant to paragraph (1) and which is in effect at the time of such review; and

(B) determine on the basis of such review whether any such species should -

(i) be removed from such list;

(ii) be changed in status from an endangered species to a threatened species; or

(iii) be changed in status from a threatened species to an endangered species.

(iv) have its specific critical habitat boundaries changed based on new scientific and commercial data.

Each determination under subparagraph (B) shall be made in accordance with the provisions of subsections (a) and (b).

(d) PROTECTIVE REGULATIONS. - Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as are necessary to provide for the conservation of such species, with an emphasis on those regulations which encourage research on interactions of management and population effects. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 9(a)(1), in the case of fish or wildlife, or section 9(a)(2), in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to section 6(a) of this Act only to the extent that such regulations have also been adopted by such State.

(e) SIMILARITY OF APPEARANCE CASES — The Secretary may, by regulation, and to the extent he deems advisable, treat any species as an endangered species or threatened species even though it is not listed pursuant to section 4 of this Act if he finds that —

§ 4(3)(A), (B), (C) No change.

(e) SIMILARITY OF APPEARANCE CASES. - The Secretary by regulation and to the extent he deems advisable, may, except for purposes of Section 7 of this Act,

treat any species as an endangered species or threatened species even though it is not listed pursuant to section 4 of this Act provided that all procedures in subsections (b) and (f) of this section have been followed in the same manner as though the species were to be listed as threatened or endangered if he finds that

(A) such species so closely resemble in appearance, at the point in question, a species which has been listed pursuant to such section that enforcement personnel ~~would have substantial difficulty in attempting to differentiate~~ using the best available scientific and commercial data would not be capable of differentiating between the listed and unlisted species.

(B) the effect of this ~~substantial difficulty~~ resemblance in appearance is an ~~additional~~ a substantial threat to an endangered or threatened species.~~; and~~

~~(C) such treatment of an unlisted species will substantially facilitate the enforcement and further the policy of this Act.~~

(f) REGULATIONS — (1) Except as provided in paragraphs (2) and (3) of this subsection and subsection (h) of this section, the provisions of section 553 of title 5, United States Code (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this Act

(2) (A) Except as provided in subparagraph (B), the case of any regulation proposed by the Secretary to carry out the purposes of this Act —

(i) the Secretary shall publish general notice of the proposed regulation (including the complete text of the regulation) in the Federal Register not less than 60 days before the effective date of the regulation, and

(ii) if any person who feels that he may be adversely affected by the proposed regulation files (within 45 days after the date of publication of general notice) objections thereto and requests a public hearing thereon, the Secretary may grant such request, but shall, if he denies such request, publish his reasons therefor in the Federal Register

(B) In the case of any regulation proposed by the Secretary to carry out the purposes of this section with respect to the determination and listing of endangered or threatened species and their critical habitats in any State (other than regulations to implement the Convention), the Secretary —

(i) shall publish general notice of the proposed regulation (including the complete text of the regulation), not less than 60 days before the effective date of the regulation, shall publish —

(I) a general notice and the complete text of the proposed regulation in the Federal Register, and

(II) if the proposed regulation specifies any critical habitat, general notice of the regulation (including a summary of the text, and a map of the proposed critical habitat) in a newspaper of general circulation within or adjacent to such habitat.

[(I) and (II) amended by PL 96-159]

(f) REGULATIONS — (1) Except as provided in paragraphs (2) and (3) of this subsection and subsection (h) of this section, the provisions of section 553 of title 5, United States Code (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this Act

(2) (A) Except as provided in subparagraph (B), the case of any regulation proposed by the Secretary to carry out the purposes of this Act —

(i) the Secretary shall publish general notice of the proposed regulation (including the complete text of the regulation) in the Federal Register not less than 60 days before the effective date of the regulation, and

(ii) if any person who feels that he may be adversely affected by the proposed regulation files (within 45 days after the date of publication of general notice) objections thereto and requests a public hearing thereon, the Secretary may grant such request, but shall, if he denies such request, publish his reasons therefor in the Federal Register

(B) In the case of any regulation proposed by the Secretary to carry out the purposes of this section with respect to the determination and listing of endangered or threatened species and their critical habitats in any State (other than regulations to implement the convention), the Secretary -

(i) shall publish general notice of the proposed regulation (including the complete text of the regulation), not less than 60 days before the effective date of the regulation, and shall publish -

(I) a general notice and the complete text of the proposed regulation including a map of the proposed critical habitat in the Federal Register, and

(II) if the proposed regulation specifies any critical habitat, general notice of the regulation (including a summary of the text, and a map of the proposed critical habitat) in a newspaper of general circulation within or adjacent to such habitat;

(ii) shall offer for publication in appropriate scientific journals the substance of the Federal Register notice referred to in clause (i)(I);

(iii) shall give actual notice of the proposed regulation (including the complete text of the regulation), and any environmental assessment or environmental impact statement prepared on the proposed regulation, not less than 60 days before the effective date of the regulation to all general local governments located within or adjacent to the proposed critical habitat, if any, and

(iv) shall—

(I) if the proposed regulation does not specify any critical habitat, promptly hold a public meeting on the proposed regulation within or adjacent to the area in which the endangered or threatened species is located, if request therefor is filed with the Secretary by any person within 45 days after the date of publication of general notice under clause (i)(I), and

(II) if the proposed regulation specifies any critical habitat, promptly hold a public meeting on the proposed regulation within the area in which such habitat is located in each State, and if requested within 15 days after the date on which the public meeting is conducted, hold a public hearing in each such State.

[(iii) amended by PL 96-159]

If a public meeting or hearing is held on any regulation, the regulation may not take effect before the 60th day after the date on which the meeting or hearing is concluded, and if more than one public meeting or hearing is

(ii) shall offer for publication in appropriate scientific journals the substance of the Federal Register notice referred to in clause (i)(I);

(iii) shall give actual notice of the proposed regulation (including the complete text of the regulation), and any environmental assessment, or environmental impact statement, and economic evaluation prepared on the proposed regulation, not less than 60 days before the effective date of the regulation to all general local governments located within or adjacent to the proposed critical habitat, if any; and

(iv) shall -

(I) ~~if the proposed regulation does not specify any critical habitat,~~ promptly hold a public meeting on the proposed regulation within or adjacent to the area in which the endangered or threatened species is located, if request therefor is filed with the Secretary by any person within 45 days after the date of publication of general notice under clause (i)(I), and

(II) ~~if the proposed regulation specifies any critical habitat,~~ promptly hold a public meeting on the proposed regulation within the area in which such critical habitat is located in each State, and if requested within 15 days after the date on which the public meeting is conducted, hold a public hearing in each such State.

If a public meeting or hearing is held on any regulation, the regulation may not take effect before the 60th day after the date on which the meeting or hearing is concluded, and if more than one public meeting or hearing is held, before the 60th day after the date on which the last such meeting or hearing is concluded. Any accidental failure to provide actual notice under clause (ii) to all general local governments required to be given notice shall not invalidate the proposed regulation.

[Sec. 4(f)(2)(B) added by PL 95-632]

held, before the 60th day after the date on which the last such meeting or hearing is concluded. Any accidental failure to provide actual notice under clause (ii) to all general local government required to be given notice shall not invalidate the proposed regulation.

§ 4(f)(2)(C) and
4(f)(3) No change.

(4) Any proposed or final regulation which specifies any critical habitat of any endangered species or threatened species shall be based on the best scientific data available, and the publication in the Federal Register of any such regulation shall, to the maximum extent practicable, be accompanied by a brief description

(4) Any proposed or final regulation which specifies any critical habitat of any endangered species or threatened species shall be based on the best commercial and scientific data available at the time, and the publication in the Federal Register of any such regulation, shall, to the maximum extent practical, be accompanied by a brief description and evaluation including an economic evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such critical habitat, or may be impacted by such designation.

and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be impacted by such designation.

§ 4(f)(5) No change.

(f) Recovery Plans. — The Secretary shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans, may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.

§ 4(g) No change.

(f) Recovery Plans. - The Secretary shall develop and implement plans (hereinafter in this subsection referred to as 'recovery plans') for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. Recovery plans may include, but are not limited to, experimental populations developed by experimental management technology which encompasses transplanting or translocating, artificial propagation and rearing, and any other innovative methodologies which will increase populations of endangered species and threatened species. The Secretary, in developing and implementing recovery plans, may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.

LAND ACQUISITION

SEC. 5(a) Program. — The Secretary, and the Secretary of Agriculture with respect to the National Forest System, shall establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species pursuant to section 4 of this Act. To carry out such a program, the appropriate Secretary—

(1) shall utilize the land acquisition and other authority under the Fish and Wildlife Act of 1956, as amended, the Fish and Wildlife Coordination Act, as amended, and the Migratory Bird Conservation Act, as appropriate; and

(2) is authorized to acquire by purchase, donation, or otherwise, lands, waters, or interest therein, and such authority shall be in addition to any other land acquisition authority vested in him.

(b) ACQUISITIONS. — Funds made available pursuant to the Land and Water Conservation Fund Act of 1965, as amended, may be used for the purpose of acquiring lands, waters, or interests therein under subsection (a) of this section.

LAND ACQUISITION

SEC. 5(a) Program. - The Secretary, and the Secretary of Agriculture with respect to the National Forest System, shall establish and implement a program to conserve ~~fish, wildlife, and plants, including those which are listed as~~ endangered species or threatened species listed pursuant to section 4 of this Act. To carry out such a program, the appropriate Secretary -

(1) shall utilize the land acquisition and other authority under the Fish and Wildlife Act of 1956, as amended, the Fish and Wildlife Coordination Act, as amended, and the Migratory Bird Conservation Act, as appropriate in acquiring designated critical habitats; and

(2) is authorized to ~~acquire by purchase, donation, or otherwise,~~ accept donations, gifts or other voluntary offerings of lands, waters, or interests therein, ~~and such authority shall be in addition to any other land acquisition authority vested in him.~~

(3) is authorized to acquire by purchase from willing sellers, lands, waters, or interests therein, which are within designated critical habitats, and such authority shall be in addition to any other land acquisition authority vested in him.

(b) ACQUISITIONS. - Funds made available pursuant to the Land and Water Conservation Fund Act of 1965, as amended, may be used for the purpose of acquiring lands, waters, or interests therein under subsection (a) of this section.

COOPERATION WITH THE STATES

SEC. 6(a) GENERAL. — In carrying out the program authorized by this Act, the Secretary shall cooperate to the maximum extent practicable with the States. Such cooperation shall include consultation with the States concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species.

(b) MANAGEMENT AGREEMENTS. — The Secretary may enter into agreements with any State for the administration and management of any area established for the conservation of endangered species or threatened species. Any revenues derived from the administration of such areas under these agreements shall be subject to the provisions of section 401 of the Act of June 15, 1935 (49 Stat. 383; 16 U.S.C. 715s).

(c) (1) COOPERATIVE AGREEMENTS. — In furtherance of the purposes of this Act, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this Act. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this Act, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species and threatened species, the Secretary must find, and annually thereafter reconfirm such finding, that under the State program —

COOPERATION WITH THE STATES

SEC. 6(a) GENERAL. — In carrying out the program authorized by this Act, the Secretary shall cooperate to the maximum extent practicable with the States. Such cooperation shall include consultation with the States concerned before acquiring any land or water, or interest therein, for the purpose of conserving any endangered species or threatened species.

(b) MANAGEMENT AGREEMENTS - The Secretary may enter into agreements with any State for the administration and management of any program established for the conservation of endangered species or threatened species. Such agreements shall not be deemed to delegate to any State any authority or jurisdiction over federal lands and resources which such state does not already have under other laws. Any revenues derived from the administration of such areas under these agreements shall be subject to the provisions of section 401 of the Act of June 15, 1935 (49 Stat. 383, 16 USC 715s).

(c)(1) In furtherance of the purposes of this Act, the Secretary is authorized to enter into a cooperative agreement with any state whose program for the conservation of endangered species and threatened species of fish, wildlife and plants meet the standards in (A)-(C) of this section. Within 120 days after the Secretary receives a certified copy of such a state program, he shall determine if it meets the standards below. If he determines the program meets these standards, he shall enter into a cooperative aggreement with the state for the purpose of assisting in implementation of the state program. A state program will be deemed to meet the standards if --

(A) authority resides in the State agency to conserve resident species of fish or wildlife determined by the State agency or the Secretary to be endangered or threatened.

(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this Act, for all resident species of fish or wildlife in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary

(C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of fish and wildlife.

(D) the State agency is authorized to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered or threatened species of fish or wildlife and

(E) provision is made for public participation in designating resident species of fish or wildlife as endangered or threatened, or that under the State program—

(i) the requirements set forth in paragraphs (3), (4) and

(5) of this subsection are complied with, and

(A) Authority rests in a state agency to conserve species determined by the Secretary to be endangered or threatened;

(B) The state agency has a program for conserving those species which the Secretary has determined to be endangered of threatened and which the Secretary agree are most urgently in need of such a program;

(C) The state agency is authorized to undertake those activities associated with scientific resources management.

(D) the State agency is authorized to establish programs, including the acquisition of land or aquatic habitat or interests therein, for the conservation of resident endangered or threatened species and

(E) provision is made for public participation in designating resident species as endangered or threatened, or that under the State program --

(i) the requirements set forth in paragraphs (3), (4) and

(5) of this subsection are complied with and

(ii) plans are included under which immediate attention will be given to those resident species which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most

(ii) plans are included under which immediate attention will be given to those resident species of fish and wildlife which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs, except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this clause and this subparagraph shall not affect the applicability of prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1) with respect to the taking of any resident endangered or threatened species.

(2) In furtherance of the purposes of this Act, the Secretary is authorized to enter into a cooperative agreement in accordance with this section with any State which establishes and maintains an adequate and active program for the conservation of endangered species and threatened species of plants. Within one hundred and twenty days after the Secretary receives a certified copy of such a proposed State program, he shall make a determination whether such program is in accordance with this Act. Unless he determines, pursuant to this paragraph, that the State program is not in accordance with this Act, he shall enter into a cooperative agreement with the State for the purpose of assisting in implementation of the State program. In order for a State program to be deemed an adequate and active program for the conservation of endangered species of plants and threatened species of plants, the Secretary must find, and annually thereafter reconfirm such finding, that under the State program —

(A) authority resides in the State agency to conserve resident species of plants determined by the State agency or the Secretary to be endangered or threatened.

(B) the State agency has established acceptable conservation programs, consistent with the purposes and policies of this Act, for all resident species of plants in the State which are deemed by the Secretary to be endangered or threatened, and has furnished a copy of such plan and program together with all pertinent details, information, and data requested to the Secretary;

(C) the State agency is authorized to conduct investigations to determine the status and requirements for survival of resident species of plants; and

(D) provision is made for public participation in designating resident species of plants as endangered or threatened; or that under the State program —

(i) the requirements set forth in subparagraphs (C) and (D) of this paragraph are complied with, and

(ii) plans are included under which immediate attention will be given to those resident species of plants which are determined by the Secretary or the State agency to be endangered or threatened and which the Secretary and the State agency agree are most urgently in need of conservation programs, except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this clause shall not affect the applicability of prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1) with respect to the taking of any resident endangered or threatened species.

[6(c) revised by PL 95-212, PL 95-632]

§ 6(d), (e) No change.

urgently in need of conservation programs, except that a cooperative agreement entered into with a State whose program is deemed adequate and active pursuant to clause (i) and this clause and this subparagraph shall not affect the applicability of prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1) with respect to the taking of any resident endangered or threatened species.

(2) The prohibitions and authorities set forth in sections 4(d)7, 9(a)(1), or section 9(a)(2) shall not apply to those resident species covered by such a state program.

(f) CONFLICTS BETWEEN FEDERAL AND STATE LAWS — Any State law or regulation which applies with respect to the importation or exportation of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this Act or by any regulation which implements this Act, or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this Act or in any regulation which implements this Act. This Act shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. Any State law or regulation respecting the taking of an endangered species or threatened species may be more restrictive than the exemptions or permits provided for in this Act or in any regulation which implements this Act but not less restrictive than the prohibitions so defined

(f) CONFLICTS BETWEEN FEDERAL AND STATE LAWS--
Any State law or regulation which applies with respect to the importation or exploration of, or interstate or foreign commerce in, endangered species or threatened species is void to the extent that it may effectively (1) permit what is prohibited by this Act or by any regulation which implements this Act or (2) prohibit what is authorized pursuant to an exemption or permit provided for in this Act or in any regulation which implements this Act. Except as provided in subsection (b) of this Act, this Act shall not otherwise be construed to void any State law or regulation which is intended to conserve migratory, resident, or introduced fish or wildlife, or to permit or prohibit sale of such fish or wildlife. Any State law or regulation respecting the taking of an endangered species or threatened species may not be more restrictive than the exemptions, permits or prohibitions provided for in this Act or in any regulation which implements this Act.

§ 6(g), (h) No change.

INTERAGENCY COOPERATION

Sec. 7. (a) FEDERAL AGENCY ACTIONS AND CONSULTATIONS. — (1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this Act. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 4 or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d).

[Sec. 7(a) amended by P.L. 96-159]

§ 7(c) - (n) Deleted.

§ 7(o) - (q) No change.

§ 8 No change.

§ 9 No change.

7(a) Federal Agency Programs. - The Secretary shall, when appropriate, utilize programs administered by him in furtherance of the purposes of this Act and utilize this Act in furtherance of such programs. All other Federal agencies shall, to the extent practicable and consistent with their primary missions and mandates, integrate conservation of species listed pursuant to section 4 of this Act with their programs.

7(b) Federal Agency Actions.

"Each Federal agency shall, in consultation with and with the assistance of the Secretary, determine that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an 'agency action) is not likely to significantly jeopardize the continued existence of any endangered species or threatened species within their critical habitat or result in the destruction or significant adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless either (i) mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition, reasonably minimize the adverse effects of the agency action upon the endangered species, threatened species or critical habitat concerned, or (ii) the economic, cultural or environmental benefits of the agency action outweigh the biological, aesthetic, economic or cultural value of the endangered species or threatened species concerned. Such determination shall be made within 60 days after an agency action is proposed by a Federal agency, state or local government or private proponent."

EXCEPTIONS

SEC. 10 (a) PERMITS — The Secretary may permit, under such terms and conditions as he may prescribe, any act otherwise prohibited by section 9 of this Act for scientific purposes or to enhance the propagation or survival of the affected species.

$ 10(b) - (i) No change.

EXCEPTIONS

SEC. 10. (a) PERMITS. - The Secretary may permit, under such terms and conditions as he may prescribe, any act otherwise prohibited by section 9 of this Act for scientific and experimental purposes or to enhance the propagation or survival of the affected species.

Such permits may be issued for, but not limited to, activities such as transplantation, artificial propagation and release and other experimental operations associated with approved plans to mitigate the adverse affects of the agency action on endangered species and threatened species pursuant to this Act.

§ 11(a)-(f) and
(h) No change.

(g) CITIZEN SUITS. — (1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf —

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this Act or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 6(g)(2)(B)(ii) of this Act, the prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1)(B) of this Act with respect to the taking of any resident endangered species or threatened species within any State.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2)(A) No action may be commenced under subparagraph (1)(A) of this section —

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1)(B) of this section —

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under section 6(g)(2)(B)(ii) of this Act to determine whether any such emergency exists.

(3)(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).

§§ 12 - 17 No change.

(g) CITIZEN SUITS. — (1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf —

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this Act or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 6(g)(2)(B)(ii) of this Act, the prohibitions set forth in or authorized pursuant to section 4(d) or section 9(a)(1)(B) of this Act with respect to the taking of any resident endangered species or threatened species within any State.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2)(A) No action may be commenced under subparagraph (1)(A) of this section —

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1)(B) of this section —

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under section 6(g)(2)(B)(ii) of this Act to determine whether any such emergency exists.

(3)(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United States as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to ~~any~~ the prevailing party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).

"Compensation for Financial Losses"

"18 (a) The Secretary is authorized to compensate persons for financial loss when he determines such persons have suffered financial losses directly caused by requirements or prohibitions of this Act or by regulations promulgated pursuant to authority provided by this Act when such requirements or prohibitions create conditions whereby a person (i) must manage lands owned by him in a manner which eliminates financial gain which would otherwise accrue if such land were managed in the absence of such requirements or prohibitions or (ii) is prevented from taking an animal or plant causing him economic damage.

(b) The Secretary shall issue such regulations as may be necessary to implement this section, including those which (i) prescribe the manner and form for applying for compensation; and (ii) describe the evidence required to substantiate the claim that loss was due to conditions described in subsection (a) of this section; (c) The Secretary shall make the determinations required by this section within 60 days after receipt of an application filed in accordance with subsection (b)(i) of this section. (d) The amount of compensation paid pursuant to this section shall be equal to the economic gain foregone or loss sustained (e) Compensation shall not be paid under this section unless application for such compensation is made (i) within one year after final regulations are issued pursuant to subsection (b)(i) of this section or (ii) within one year after final regulations are issued by the Secretary which establish requirements or prohibitions alleged to cause losses. (f) The Secretary's determination shall be an agency final action for purposes of judicial review. (g) There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this section.

(c) Failure to compensate a person whom the Secretary has determined has suffered economic losses under the terms of this section within one year of such determination, shall be considered permission for that person to conduct the action causing economic loss without prosecution, injunction, or penalty otherwise provided in this Act.

(d) Notwithstanding the provisions of this Section, nothing in this Act shall be deemed to authorize the Secretary to acquire lands or interests therein by eminent domain.

TESTIMONY OF KENNETH BERLIN
CONCERNING
S.2309, A BILL TO AMEND THE ENDANGERED SPECIES ACT

BEFORE THE
SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION
OF THE
COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS
UNITED STATES SENATE

APRIL 22, 1982

Mr. Chairman and members of the subcommittee, I am Counsel and Legislative Director for Wildlife for the National Audubon Society. I am also chairman of a committee that is coordinating the activities of a large number of groups concerned about the reauthorization of the Endangered Species Act. I would like to thank you for giving me this opportunity to testify on behalf of the National Audubon Society and the groups listed below * concerning S.2309, a bill to amend the Endangered Species Act.

On December 8, 1981, I appeared before this subcommittee to testify during oversight hearings in support of the Endangered Species Act. During that first round of testimony, Michael Bean of the Environmental Defense Fund and I testified on behalf of a large number of environmental groups, splitting our testimony between sections 4, 7 and 9 of the Act, respectively. Today, I will similarly limit my testimony.

Since my December 8 testimony, Senators Chafee, Mitchell and Gorton have introduced S.2309 (hereinafter the "Chafee bill"). The groups on whose behalf I testify applaud their effort. In particular, we agree that a review of the workings of sections 7 and 9 clearly demonstrate that the Act has worked exceedingly well and that amendments to those sections should address only procedural questions or inconsistencies between the two sections.

---

* Defenders of Wildlife, Audubon Naturalists, Natural Resources Defense Council, Greenpeace, U.S.A., Wilderness Society, Humane Society, Friends of the Earth, Society for Animal Protective Legislation, Massachusetts Audubon, Sierra Club, World Wildlife Fund-U.S., American Association of Zoological Parks & Aquariums, Animal Protection Institute, National Parks & Conservation Association, Center for Environmental Education, Environmental Defense Fund

We believe, however, that the procedural changes suggested in the Chafee bill need to be revised. I will review the workings of the Act updating my earlier testimony using newly available statistics to demonstrate why no substantive changes are necessary, and then propose amendments.

Also, since December 8, a number of industries have submitted a very limited list of alleged problems with the Act. I will address these problems one at a time to establish that none of them justify additional amendments to the Act.

I. SECTION 7 HAS WORKED EXTREMELY WELL

As I pointed out on December 8, section 7 prevents any federal agency from taking any action that is likely to jeopardize the survival of a listed species or adversely affect its critical habitat. When a possible conflict exists between a species and a federal action, the federal action agency consults with the Fish and Wildlife and/or the National Marine Fisheries Services and one or both of these Services issues a biological opinion stating whether the action will jeopardize the survival of the species. If the Service finds jeopardy, the action agency or the project sponsor can seek an exemption from the section 7 prohibitions.

The section 7 process is widely misunderstood. Its impact on economic development has been grossly and unfairly exaggerated.

(A) The Scope of Section 7's Prohibitions

The first misunderstood factor about section 7 is the scope of its prohibitions. Contrary to some comments about the Act, the section 7 jeopardy provision applies only to the species as a whole, not to individuals of a species. Thus, before the Fish and Wildlife or National Marine Fisheries Service can make a jeopardy finding, it must decide that the federal activity will jeopardize the survival of a listed species, not just the survival of one individual of the species. The limited nature of section 7 is best demonstated by the fact that of the 9,686 consultations the Fish and Wildlife Service conducted during the past three years, only in 185 (1.9 percent) of these did the Service find a sufficient conflict between the species and the project to make even a preliminary jeopardy finding.

(B) Section 7 Does Not Inflexibly Stop Economic Activity

Industry claims that section 7 inflexibly stops economic development are not supported by the history of the implementation of the Act.

Rather, section 7 helps identify, and therefore avoid, conflicts between species and economic development. If adverse effects upon a species are found early in project planning, the project can often be modified to avoid conflict. That is exactly what happens in most instances. In Fish and Wildlife Region 7, for example, the director wrote that 90 percent of potential conflicts are resolved through informal consultation proceedings.

Formal consultations, even those leading to jeopardy opinions, are just as likely to resolve conflicts. As shown on the attached summary sheet prepared by the Fish and Wildlife Service, in all but 15 of the 135 jeopardy opinions issued during the past three years, the project sponsor was able to proceed after the issuance of the jeopardy opinion. In seven of the fifteen cases, consultation continues, and in six of the instances, the sponsor halted the project for reasons unrelated to the opinion. In the remaining two cases, it is not clear whether the jeopardy opinion or unrelated economic reasons stopped the project. Thus, while environmental groups or industry may disagree over various aspects of these opinions, the fact remains that in virtually all cases, project sponsors have successfully modified their projects to avoid conflict with endangered or threatened species; in no case anywhere in the country has a project sponsor sought an exemption during the last three years. *

(C) Section 7 Has Not Unduly Delayed Projects

The evidence also shows that the section 7 process does not delay projects unreasonably. The Act provides that the relevant service must complete consultation within 90 days.

The attached Fish and Wildlife Service study reviewed 1,845 formal consultations and found an average consultation time of only 59.7 days, one-third less than the statutory maximum.

There have, of course, been some delays. The Fish and Wildlife Service study shows that 278 of the over 9,600 consultations in the last three years extended beyond the 90-day period. In all cases, consultation was extended: (1) at the agency's request; (2) to gather more information; or (3) because of the complexity of the project.

We do not believe these delayed consultations support an argument that the Act needs to be amended. First, in virtually every one of those cases, the project had not yet met other statutory requirements and thus could not have proceeded during the extended

---

* In one case, a project sponsor applied for an exemption, but a court ruled that the application was premature.

consultation. As the acting regional director in Fish and Wildlife Region 6 wrote, "We believe that there have been few instances in Region 6 where projects have been delayed solely because of the Endangered Species Act. In most cases, there have been other problems that would have delayed the projects even if the Endangered Species Act did not exist."

Second, during the past three years, the Fish and Wildlife Service has drastically reduced delay time. The average extension beyond the 90-day consultation period for opinions which found no jeopardy decreased from 89 days in 1979, to 71 days in 1980 and to only 42 days in 1981. Similarly, the average delay for opinions finding jeopardy decreased from 119 days in 1979 to 82 days in 1980 to only 37 days in 1981. At the same time, the number of delayed opinions decreased from 127 in 1980 to only 46 in 1981.

Despite the fact that delays under the statute have been minimal, the Chafee bill proposes changing the law to give a project sponsor a veto over joint Fish and Wildlife and action agency decisions to extend a consultation beyond 90 days. We believe that such a veto is ill-advised. Most delays are short, and failure to allow delay in appropriate cases would result in an increase in the number of opinions based on inadequate evidence. Such opinions should be avoided whenever possible to ensure protection of species and to minimize unnecessary conflicts between projects and species.

We recognize, however, that industry needs to know how long a consultation will take. Accordingly, we recommend that the final sentence of section 7(b) in the Chafee bill be amended to read:

SEC. 6 CONSULTATION PROCESS____Section 7(b) of the Endangered Species Act is amended by adding at the end thereof, "in consultation with affected permit or license applicants, if any. When the consultation period is extended, the Secretary shall specify, before the end of the original 90-day consultation period, the information required to complete the consultation and the date on which the biological opinion will be completed."

(D) The Exemption Process Ensures That the Act Does Not Stop Economic Development

Industry arguments that the Act stops economic development blatantly ignore the fact that the exemption process enables industry to proceed with a project regardless of its effect on endangered or threatened species. Under the current Act, an exemption application is considered by a three-person review board which submits recommendations to a cabinet-level committee for final decision. Although the cabinet-level committee is comprised of political appointees, the three-member review board is carefully balanced to ensure both its political neutrality and the integrity of the administrative record it develops for review by the cabinet-level committee. After the cabinet-level committee receives this record, it utilizes it to make an exemption decision which is based predominately on economic grounds.

Industry's only potential complaint about the exemption process is that it is too long and cumbersome. To resolve that complaint, the Chafee bill proposes to reduce the time required to process an exemption application from a maximum of 450 to a maximum of 200 days.*

---

* The American Mining Congress has stated in past testimony that an exemption takes over 800 days. The figures quoted in this testimony accurately state the time added to the section 7 process when an exemption application is filed.

Prior to the introduction of the Chafee bill, the National Wildlife Federation (NWF) proposed a similar amendment which would have reduced the processing time for an exemption application to 225 days. Both the Chafee and NWF amendments seek to streamline the exemption process by abolishing the review board. Under the NWF plan, an administrative law judge would replace the review board. Under the Chafee bill, the Secretary of Interior or Commerce would undertake the review board's tasks.

We object to the Chafee bill's approach since we believe it would politicize the exemption process. Exemption applications will often be submitted at a time of intense political interest in a project. To ensure that decisions regarding exemption applications are based on the best available information, some neutral party must compile that information without political interference. An administrative law judge (ALJ) is insulated from such interference. The Secretary of Interior or Commerce is not. We, therefore, believe the ALJ approach will lead to better and fairer decisions.

(E) Section 7 Properly Balances Economics and the Environment

To conclude the review of section 7, even by the most conservative standard of economic review, a statute is remarkably successful in finding the proper balance between economic growth and environmental protection if it protects species without stopping projects of economic importance. Section 7 of the Endangered Species Act has succeeded in achieving this fine balance. In many cases of conflict between species and a project, the sponsor has modified the project to protect the species. While this might make the project somewhat more costly, the Act is working if it does not make the project uneconomical. Indeed, as the testimony of the scientific experts present on December 8 established, the avoidable loss of species could cause incalculable economic damage and other losses to humanity. The extra cost to a project sponsor for protecting species merely internalizes a fraction of that cost. Moreover, the Act provides an ultimate exemption from its provisions if the project cannot be altered and if it is of sufficient economic importance.

II. INDUSTRY HAS NOT PRODUCED ANY EXAMPLES OF SECTION 7 PROBLEMS

As of the date of the preparation of this testimony, industry sources have identified only the following handful of alleged problems with the Act: (1) the ASARCO Cabinet mountain exploration delay (Western Regional Council); (2) the Wildcat Reservoir jeopardy opinion (Id.); (3) Wickes' Forest Industries problems in the Nez Percé National Forest (Forest Products Industry); (4) the ban on the use of compound 1080 as a rodenticide in South Dakota; (5) the delays in granting permits for dam construction on the Colorado and Green Rivers (Colorado River Water Conservation District and the Western Water Resources Council); (6) red-cockaded woodpecker protection in the Southeast (Id.); and (7) the Northeast Utilities nuclear plant at Montague, Massachusetts. The last two of the alleged problems relate to section 9 of the Act, not section 7, and will be addressed in the discussion of that section. The water projects will be discussed the the next section.

(A) The Cabinet Mountains Example

The Western Regional Council (hereinafter WRC) cites the ASARCO situation to allege that the Department of the Interior used the Act to delay and burden a project when in fact there was no legitimate reason to do so. A review of the facts, as more fully described in the attached memorandum prepared by the Fish and Wildlfie Service area manager in Billings, Montana, establishes that many of the statements made on behalf of ASARCO are "incomplete or a distortion of the facts". When the facts are accurately characterized, they do not support ASARCO's claim.

The WRC pointed out in prior testimony that the exploration arm of the Kennecott Corporation discovered copper-silver mineralization in 1963 in the area that subsequently became the Cabinet Mountains Wilderness. ASARCO acquired the relevant exploration rights in the early 1970's and finally, in 1979, 16 years after the Kennecott discovery, decided to extend its active exploration to within the wilderness boundary. On April 2, 1979, the Forest Service approved ASARCO's plan of operation; the Forest Service, however, did not initiate consultation until May 21, 1979. The Fish and Wildlife Service issued its biological opinion on August 3, 1979. Thus:

1) The Fish and Wildlife Service issued its biological opinion in less than 80 days, well within the 90-day period specified in the Act. Any delay in the process resulted from the seven weeks it took the Forest Service to initiate consultation.

2) Even if we include the seven-week delay as part of consultation and assume that consultation took four to five months, the exploring companies waited 16 years before beginning exploration. That hardly puts them in a strong position to complain about a one or two month delay.

3) During the period of the consultation, ASARCO drilled two holes outside the wilderness area within 1,500 feet of its proposed site.

The WRC also suggests that there is no biological justification for the Fish and Wildlife Service's treating the project as one that might jeopardize the grizzly bear. That issue is fully responded to in the attached Fish and Wildlife Service memorandum. In summary:

a) The grizzly bear has undergone a 99 percent reduction in its numbers and range during this century.

b) Contrary to the WRC statement, the biological assessment identified 28 sightings of grizzly bears or their signs in the Cabinet mountains. Researchers have since observed four grizzlies approximately four or five miles from ASARCO's claim block during one reconnaissance flight.

c) According to the Fish and Wildlife Service memo, the assertion that the only area impacted is the specific area occupied by the drilling rigs (one-half acre) is ludicrous.

d) Contrary to the WRC testimony, ASARCO has not conducted expensive research (p. 7 of Fish and Wildlife memo).

To conclude, the Cabinet Mountain example illustrates the fact that the Act works exactly as Congress intended. Within 90 days of the beginning of the consultation process, the Fish and Wildlife Service completed its biological opinion. Eventually, the project was approved with a seasonal drilling restriction that protects the endangered species without stopping the project. Equally significant, the example represents an unsuccessful attempt to blame the Act for a myriad of problems ASARCO faces. As pointed out in the Fish and Wildlife memorandum, the Forest Service placed 61 additional restrictions on the project. Moreover, the project is in a wilderness area and the strictures of the Wilderness Act are far greater than those in the Endangered Species Act.

(B) The Wildcat Reservoir

The WRC Wildcat Reservoir example, cited as evidence that the Act is adversely affecting western water use, establishes only that projects are more often delayed by ideology than by environmental restrictions.

The Wildcat Reservoir problem arises out of the necessity of the project sponsors to obtain a permit under section 404 of the Clean Water Act from the U.S. Army Corps of Engineers prior to discharging dredged or fill material into Wildcat Creek incident to the construction of a reservoir approximately two miles upstream from its confluence with the South Platte River. Following the issuance of a biological opinion which found that the project might jeopardize whooping cranes unless the sponsors agreed to mitigation measures, the Corps informed the sponsors that they could not grant a nationwide 404 permit and that an "individual permit" processed in the usual manner would be required before constructing the dam.

The project sponsors never sought that permit. Instead, they instituted what promises to be a multi-year litigation to establish in essence that the Act cannot be applied to their water rights. The sponsors instituted the suit despite the fact that the Corps had not denied their permit and despite the fact that similar projects have proceeded, albeit with modifications (here the sponsors estimate their project's value at $181,800,000 in a taking claim in the lawsuit). The example is, thus, one of ideology replacing common sense, not of a problem with the Act. *

(C) The Wickes Example

Although the forest products' industry proposes to completely gut section 7 of the Act, the only example it provides of a section 7 problem concerns two appeals within the Forest Service of a proposed road and timber sale. As far as we know, however, the Fish and Wildlife Service has not been asked to issue a biological opinion and there has been no jeopardy finding. Rather, Wickes' problem appears to arise from the fact that the land is national forest land that must be managed for multiple-use purposes.

---

* The WRC also cites a peregrine falcon experimental population example. We believe that the experimental population amendment discussed by Michael Bean addresses this problem. The Houston toad example, also cited by WRC, is too imprecise to enable us to respond.

(D) The South Dakota 1080 Problem

On February 22, 1982, the Secretary of Agriculture for the State of South Dakota testified that section 7 of the Act had prevented his state from using compound 1080 as a rodenticide to control prairie dogs. According to his testimony, the federal government rejected his state's 1080 request because of its possible impact on black-footed ferrets, an endangered species. As a result, he claimed, South Dakota was suffering from a massive increase in prairie dog colonies, causing severe economic harm to his state.

As indicated in that testimony, the Fish and Wildlife Service did find that 1080's use would jeopardize the ferret (the biological opinion, dated June 19, 1980 is attached) and EPA, in an attached memo dated July 18, 1980, refused to approve the use. A more detailed analysis titled "IRB Efficiency Review" dated January 7, 1980, is also attached. A review of these documents shows that the request was denied because of the existence of an environmentally safe effective alternative.

The South Dakota witness stated the alternative, zinc phosphide, did not work. Every available study of which we are aware, however, contradicts his statement. As EPA wrote,

> "....The information submitted in connection with this request does not support the Applicant's contentions that the use of zinc phosphide would be excessively expensive and would result in poor control due to special environmental circumstances. Treatment cost estimates were found to be unrepresentative of the actual relative costs of the use of zinc phosphide and 1080 (refer to the economic analysis in the next paragraph). The

> existence of successful control programs in neighboring lands where zinc phosphide has been used indicates that it could be used successfully on the lands for which the exemption is requested.
>
> A review of the request by the Economic Analysis Branch, BFSD (Appendix D) indicates that the Applicant overstated the economic "benefits" from the proposed use of 1080 by ten-fold. Available data suggest that both strychnine and zinc phosphide are cost effective, currently available, and have been effectively used to control the blacktail prairie dogs when proper baiting procedures have been followed."

The IRB document more fully summarizes the evidence. Although zinc phosphide works it is somewhat more expensive to apply. If that expense is too great, South Dakota could seek an exemption. The South Dakota witness testified, however, that he had never heard of the exemption process. We believe that the use of an environmentally safe alternative instead of a dangerous poison on as much as 1 million acres is in the interest of people, not just endangered species.

III. THE ACT HAS NOT ADVERSELY AFFECTED WESTERN WATER USE

A number of organizations have testified that the Act unduly interferes with western water use. They argue that the Act should contain a provision, similar to section 101(g) of the Clean Water Act, which prohibits interference by the Endangered Species Act in western water allocation. Such arguments ignore fundamental differences between the Acts as well as eight years of implementation of the Endangered Species Act.

Western water interests argue that section 101(g) of the Clean Water Act is designed to ensure that the federal government does not use water quality concerns to justify control over water quantity in the west. While we do not believe such a distinction can or should be made, arguably the west can control water quality using traditional pollution control devices.

The Endangered Species Act, of course, serves an entirely different purpose. It protects species from extinction, including those dependent on water in the west. Thus, unlike the Clean Water Act where the goals of the Act can arguably be achieved without regulating western water quantity, the Endangered Species Act cannot stop extinctions of water dependent species if there is an inadequate flow of water available to them.

Equally important, there is no economic justification for such extinctions. As previously indicated, there are no examples in Fish and Wildlife Service Region 6, the principal western region, of the section 7 process either unduly delaying or stopping a project. Fish and Wildlife Service data has not identified a single western water project stopped by the Act.

Even if the Act's provisions prove incompatible with a western water use, the exemption process provides for the completion of any western water project of sufficient economic value.

To conclude, the Endangered Species Act sets forth a national goal of protecting species from extinction. There is no greater economic reason to drop that goal when western water use is involved than when any other use is affected. In the final analysis, the Act will not stop any water projects of any real economic value.

(A) Specific Examples - Western Water Problems

The National Audubon Society and the National Wildlife Federation have reviewed the status of western water projects. Our analysis reveals that:

1) The Act has not stopped a single water project.

2) Where a water project has the potential of jeopardizing the survival of species, the Fish and Wildlife Service has approved the project with proper mitigation or enhancement measures. The Fish and Wildlife Service found no jeopardy for the Windy Gap project in Colorado, for example, after the sponsors had agreed to by-pass 11,000 acre feet of water per year for the conservation of downstream aquatic habitat, primarily for non-endangered trout. Although not intended specifically to benefit endangered species, the Service found that when combined with habitat enhancement and research, the measures ensured that the project would not jeopardize endangered species.

3) Where the Service found that it lacked sufficient information to determine whether a project might jeopardize a species, it suggested that the project could be built but that at its conclusion, if research required, the stream flow would have to be enhanced by releases from other projects (Moon Lake and Third Unit of the Craig Station, Colorado project), by-passes from proposed projects (Windy Gap Project) or by such releases and habitat mitigation (Upalco Unit of the Central Utah Project).

4) Approximately 16 projects on the Colorado and Green Rivers have been delayed by the Act while a study * of the status of several endangered fish proceeded. In virtually all cases, however, as stated by the regional director in Fish and Wildlife Region 6, other environmental laws were also delaying each project. The key study is now complete, moreover, and any delays should end shortly. Further, in all cases the project sponsor could have proceeded to build the project during the study if the sponsor was willing to accept the type of alternatives described in example 3 above.

5) It is possible that some projects will be able to proceed only if the project sponsor agrees to maintain stream flows through by-passes or releases from other projects. To date, such requirements have not stopped any project. Should they prove too expensive, the sponsor can seek an exemption from the requirements of section 7.

---

* The study was conducted by the Colorado River Fishes Investigation Team established in April 1979. The study is staffed with Fish and Wildlife Service personnel. Other participants are the Utah Division of Wildlife Resources and the Colorado Division of Wildlife.

6) Attached to this testimony are two fact sheets, one prepared by the Fish & Wildlife Service, and one jointly prepared by National Audubon and the National Wildlife Federation, analyzing each of the eight projects which we believe western water users have mentioned as having been affected by the Act. A review of the fact sheets shows that each project fits into one of the five categories mentioned above.

Throughout the debate of the effect of water projects on water rights, the Fish and Wildlife Service has taken the position that:

> The continued existence of the Colorado squawfish, humpback chubs and the bonytail chub will require cooperation and communication between diverse interest groups. Every effort will be made to avoid delaying water development projects because of the need to conserve the endangered fish species. However, there may be some delay, compromises and modifications to maintain certain environmental conditions. (Windy Gap Project Biological Opinion, March 13, 1981.)

Thus, the Act has neither stopped nor significantly delayed water projects. The main cause of uncertainty, the status of several fishes studied by the Colorado River Fishes Investigation Team, should be ended by the report from their now completed study.

IV. SECTION 9 OF THE ACT SHOULD CONTINUE TO PREVENT "HARM" TO SPECIES

Section 9 of the Act makes it illegal to "take" endangered and threatened species of fish and wildlife. "Take" is defined to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

A number of industry representatives seek to remove the word "harm" from the definition of "take". They argue that the word "harm" has been extended to private actions which lead to habitat modifications and thus places unacceptable burdens on industry. Again, the facts do not support their claim.

The Reagan Administration has just concluded an exhaustive review of the "harm" issue during the course of drafting new regulations defining the word "take". After receiving 382 comments, 30 of which made substantive or analytical analyses, the Fish and Wildlife Service redefined "harm" to read:

> An act which actually kills or injures wildlife. Such act may include significant habitat modification or degredation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns including breeding, feeding or sheltering.

Although the groups on whose behalf I testify are not entirely satisfied with the definition, we submit that it should not be modified without proof that it is causing harm to industry.

Even prior to the redefinition of harm, section 9 did not cause industry any significant problems. In the eight years from the passage of the Act until the 1981 redefinition, courts entered only one injunction for a section 9 habitat destruction case, one involving a state action which provides only a very limited precedent because the action enjoined threatened to drive an endangered bird into extinction. It thus clearly met the requirement for an injunction that there be irreparable injury.

Although none of the industry groups can cite an example of court action under section 9 affecting private interests, the NFPA cites examples of voluntary, but allegedly costly actions, which they claim their members have had to undertake on private land to avoid harm. The principal example they cite relates to incurred by companies in protecting red-cockaded woodpeckers. One company states it has set aside 155 acres of timber valued at $115,000 per year, another company states that it is spending $86 to $150 per acre per year to protect the woodpeckers while also producing timber.

We of course, applaud the effort of these companies and from the NFPA letter cannot tell if these companies are complaining about their costs. Many companies, such as Westvaco, developed endangered species programs before the Act passed in 1973, and many have received excellent publicity for their efforts. A copy of a recent South Carolina newspaper story about Westvaco is attached.

As is obvious from the NFPA description, timber companies can develop plans to protect the woodpecker while still maintaining their profitability. They can seek, if they choose, an enhancement permit under section 10 of the Act to enable them to produce timber in red-cockaded woodpecker habitat as part of a management scheme like the one described in the NFPA letter. We support the development of such plans and the granting of permits in appropriate situations.

Nothing in the NFPA testimony establishes that the definition of "harm" is causing unacceptable costs for their industry. The costs that are incurred are incidental to removing the socially and environmentally negative effects of species extinction. Nevertheless, we see no reason why businesses, which incur costs to protect endangered species, should not be entitled to tax relief such as industry receives for the installation of pollution control equipment. The NFPA appears to be proposing such relief, but it has not yet produced a bill. The groups on whose behalf I am testifying support such relief in the abstract providing it is sought in a separate piece of legislation. We look forward to seeing a draft of the NFPA bill.

The final example of a section 9 problem involves a claim by Northeast Nuclear Energy Company that the "taking" provision in the Act led EPA to deny a National Pollutant Discharge Elimination System permit authorizing discharges in the Connecticut River from a proposed nuclear power station at Montague, Massachusetts. A review of the evidence, however, shows that the plant sponsors stopped it for cost reasons, that the Endangered Species Act problem was of little or no concern to environmental groups, and that EPA's comments were only preliminary.

We recognize, however, that EPA did take the preliminary position stated by Northeast and that there is a potential conflict between section 9 and section 7 since the former section addresses activities affecting individuals of a species, the latter activities affecting the full species. The Chafee bill seeks to redress this problem by exempting projects from section 9 if they comply with a section 7 opinion that permits the project to proceed. We think this approach is too broad. We believe all project sponsors should attempt to take reasonable measures to avoid unnecessary death or injury to endangered species. Normally, a section 7 biological opinion does not specify what those measures should be. Thus, to avoid such unnecessary harm, we believe an amendment resolving the section 7 and 9 conflict must address the question of minimizing unnecessary "taking".

An amendment which would resolve this issue in the least intrusive way possible is set forth below. It requires that, at the request of a project sponsor or federal agency, the Secretary of Interior or Commerce must append to a biological opinion a section specifying all reasonable and prudent measures a project sponsor must take to minimize the "taking" of individuals of an endangered or threatened species. As long as the project sponsor's activities are consistent with those measures, the activities are exempt from section 9. We believe this approach would be used only in the unusual case where a project sponsor needs such an exemption, and that it would let the project sponsor know exactly what his responsibilities are. We therefore, recommend that the Senate substitute this amendment for the one now contained in the Chafee bill.

Proposed Section 7, 9 Amendment

Section 7(o) of the Endangered Species Act of 1973 is amended by striking out subsection (o) thereof and inserting in lieu thereof the following:

(1) At the request of a permit or license applicant or a federal action agency, the Secretary shall specify all reasonable and prudent measures which must be taken in order to minimize the taking of the species which is the subject of the consultation under subsection (b) and shall do so by appending a section to the Secretary's opinion specifying such measures within 30 days after the completion of such consultation, or the request occurs thereafter, within 30 days after the receipt of the request.

(2) Notwithstanding subsections 4(d) and 9(a)(B) of this Act or any regulation promulgated pursuant to such sections, any activity:

   (a) consistent with the reasonable and prudent measures specified pursuant to Paragraph 1 of this section; or

   (b) for which an exemption was granted pursuant to subsection (h) of this section

shall not be considered a taking of the species which was the subject of the biological opinion, or in the case of an activity for which an exemption was granted, shall not be considered the taking of any endangered or threatened species, provided that no such exemption shall apply to any activity undertaken for the purpose of taking any species of plant or wildlife.

CONCLUSION

With the changes suggested in this testimony, the environmental groups on whose behalf I testify, strongly support the Chafee bill's provisions which relate to sections 7 and 9 of the Act. The bill properly rejects the completely unsubstantiated claims by industry that the Endangered Species Act needs substantial revision.

REAUTHORIZATION OF THE ENDANGERED SPECIES ACT
SECTION 7 CONSULTATION SUMMARIES
1979 to 1981

(26 February 1982)

The following information is summarized from data compiled after a 2-month review (completed February 1982) of all Regional and Washington Office consultation files. This analysis replaces all earlier documents summarizing consultation activity for the fiscal years 1979 to 1981.

I. Consultation totals for all Regions, including the Washington Office:

A. FY year	Informal Consultations	Formal Consultations/	No jeopardy /	Jeopardy
1979	1,585	980	858	87
1980	2,374	729	647	68
1981	3,535	483	422	30
Totals:	7,494 (1.)	2,192 (2.)	1,927 (3.)	185 (4.)

1. Informal consultation does not result in a biological opinion. When agencies notify the FWS early in their planning process, often formal consultation is avoided, as indicated by the yearly (ave. 30%) increase in the number of informal consultations with the corresponding yearly (ave. 30%) decrease in the number of formal consultations and jeopardy opinions (see graph page 5).

2. 90 formal consultations were cancelled or withdrawn with no endangered species problems nor impacts to the projects. 38 consultations are continuing as of January 1982 (see page 3).

3. Of the 1,927 no jeopardy biological opinions, 493 (26%) also included activities that "would promote the conservation of listed species."

4. Of the 185 jeopardy biological opinions, 54 (29%) also included specific project activities that "are not likely to jeopardize" listed species. The purpose of the Act is to inform the public and project sponsors that a problem exists. Alternatives, suggested through consultation, offer project sponsors a means of proceeding with the project while avoiding further impacts to the species or habitat (see page 4).

B. Average consultation time for all formal opinions (in days):
(where data was available)

FY year	Number/No jeopardy		Number/Jeopardy	
1979	713	56.4 days	77	104.9 days
1980	629	53.5 days	68	111.2 days
1981	430	44.7 days	28	56.3 days
Average time:		52.4 days		99.8 days

Average time for 1,845 consultations: 59.7 days

1. 278 consultations (15%) were extended beyond the 90-day period to complete formal consultation. In all cases consultation was extended: (1) at the agencies request; (2) to gather more information; or (3) because of the complexity of the project. All extensions were mutually agreed to between the FWS and the consulting agency. There are 2 known exceptions where the consultation was misplaced.

a. Number of consultations extended beyond the 90-day period:

FY year	no jeopardy	jeopardy		
1979	79	26		
1980	96	31		
1981	39	7		
Total:	214	64	=	278

214 (77%) resulted in no jeopardy decisions with no project problems

b. Average extension beyond the 90-day consultation period required to complete formal consultation for those totalled in part a. (in days):

FY year	No jeopardy	Jeopardy
1979	89.0	119.3 days
1980	71.1	81.9 days
1981	42.1	37.1 days
Average:	71.9	93.3 days

105 (38%) were completed within 2 weeks of the end of the 90-day period

II. Formal consultation: Analysis of totals from part I

A. Inter-Agency consultation: all non-Interior Department Agencies and Interior (other than Fish and Wildlife Service)

FY year	Formals	Cancelled	Continuing	No Jeopardy	Jeopardy
1979	377	23	2	290	68
1980	362	20	19	302	57
1981	205	13	17	157	22
Totals:	944	56 (1.)	38 (2.)	749 (3.)	147 (4.)

Intra-Service consultation: Fish and Wildlife Service, including Wildlife Permit Office (research and import/export permits)

FY year	Formals	Cancelled	Continuing	No Jeopardy	Jeopardy
1979	603	16	0	568	19
1980	367	12	0	345	11
1981	278	6	0	265	8
Totals:	1,248	34 (1.)	0 (2.)	1,178 (3.)	38 (4.)

1. Consultations cancelled because the agency/person (wildlife permit) withdrew the request or it was determined informally that there was no effect to listed species; therefore, no consultation was necessary.

2. Consultations continuing because they were recently initiated (17), or consultation was extended by mutual agreement to complete further study (21) to assess project impacts and develop recommendations or alternatives that allow projects to proceed while avoiding impacts to the species or habitat. Consultation will then be completed by the Service.

3. As far as is known, all projects receiving a no jeopardy biological opinion proceeded to completion; there were no associated endangered species conflicts in those cases.

4. Jeopardy totals: (see page 3)

III. Formal consultation: Analysis of jeopardy data from totals in part II

A. Jeopardy opinions rendered, FWS' suggested alternatives accepted, and the project proceeded: 97

B. Jeopardy opinions rendered, agency decision unknown, however the project proceeded: 72

C. Jeopardy opinions rendered, suggested alternatives rejected, and the project proceeded: 1

1. The EPA recently registered a pesticide (Lorsban) prior to completion of formal consultation (jeopardy with alternatives).

D. Jeopardy opinions rendered, however discussions continuing concerning the FWS' suggested alternatives: 7

1. Warner Valley reservoir (Utah), discussions continuing with BLM, FWS, and the project sponsors to develop alternatives.
2. Road construction for a timber sale in Clearwater NF (Idaho), discussions continuing with FWS and FS over suggested alternatives.
3. Wildcat reservoir (Colorado), after refusing the exemption procedure, now awaiting resolution of litigation. FWS is reviewing the jeopardy opinion relative to the new whooping crane management plan. (COE)
4. North Fork Flathead Road improvement (Montana) awaitng EIS. (FHWA)
5. Prairie Du Chien barge facility (Wisconsin), other problems besides ES. Another facility substituted, however discussions continuing. (COE)
6. Oil waste water disposal facility (California), alternatives accepted, however still negotiating over a separate BLM-required alternative.
7. Pittston Oil refinery recently received an EPA permit to proceed with the project, however this has resulted in litigation.

E. Jeopardy opinions rendered, project cancelled or withdrawn: 8

1. Powell River (Tennessee), gravel (404) permit. Applicant withdrew the application during discussions over alternatives (reason unknown). (COE)
2. Occidental Petroleum oil drilling (Calif.). One well was drilled without authorization from BLM. After the opinion was rendered, O.P. rejected the alternatives and abandoned plans for another well; reason unknown.
3. Mays Landing offshore oil facility (Calif.). The applicant refused to conduct an oil spill risk analysis (suggested alternative), so COE denied the permit. An alternative facility was used; no consultation required.
4. COE application to fill a wetland (Saipan) cancelled for reasons other than endangered species after the opinion was rendered.
5. Ford dealership construction in vernal pool area (Calif.). Accepted the alternatives, however the project was dropped because of funding problems due to slump in auto industry. (COE)
6. Residential housing development in the vernal pool area (Calif.). Some development begun during consultation, however slump in housing industry stalled the project after delay over discussions on alternatives. (VA)
7. Lava flow control study (Hawaii) was cancelled because the feasibility study indicated that the project was not economical. (COE)
8. Red River Basin chloride control project (Oklahoma), consultation reinitiated, however project dropped for economic reasons. (COE)

STATE OF COLORADO
DEPARTMENT OF NATURAL RESOURCES
EXECUTIVE DIRECTOR'S OFFICE
1313 SHERMAN STREET, ROOM 718
DENVER, COLORADO 80203

May 7, 1982

The Honorable John Chafee, Chairman
Senate Subcommittee on Environmental Pollution
United States Senate
Washington, D. C. 20510

Dear Senator Chafee:

The Colorado Natural Areas Council created by the Colorado Natural Areas Act to advise the Colorado Natural Areas Program (Colorado Department of Natural Resources), requests that this letter be made part of the official hearing record for the hearings held by the Subcommittee on Environmental Pollution, which you chair.

The Colorado Natural Areas Council, composed of four members appointed by the Governor and three members from other related boards and commissions in the Department of Natural Resources, identifies, evaluates and protects (through voluntary agreements with public and private landowners) areas of statewide ecological significance. The Program serves as the state's plant conservation agency through a Cooperative Agreement (under Section 6 of the Endangered Species Act) between the Department of Natural Resources and the U. S. Fish and Wildlife Service.

The Council believes that one of the most immediate and pressing problems in the United States is the protection of the Endangered Species Act, since its goal is to stop the eradication of entire species from the face of the earth. Species of plants and animals interrelate in countless ways which are of vital importance to them (including man) and to the natural communities in which they live.

The Council thanks you and your colleagues, Senators Mitchell and Gorton, for sponsoring S. 2309. Generally, the bill assures continued strong legal protection for endangered and threatened species of plants and animals. In particular, we applaud the continued inclusion of all eligible species, including plants and invertebrates, foreign species, and separate populations of vertebrates. We appreciate the refusal to prohibit States from adopting their own, more restrictive, programs. We are grateful for the proposal to increase federal funding match for Section 6 Cooperative Agreements with States for the conservation of endangered and threatened species of plants and animals. The total elimination of Section 6 funds to the Natural Areas Program in the FY '82 budget has nearly abolished Colorado's substantial accomplishments and continued efforts for the conservation of endangered and threatened species of plants.

We hope that the Committee on Environment and Public Works will be able to persuade the Appropriations Committee to provide adequate funding for this and other portions of the Endangered Species Program.

While we recognize that some species may benefit from introduction of experimental populations, we believe that the primary emphasis must remain on conservation and restoration of natural populations in the habitats where they evolved.

The Colorado Natural Areas Council would like to suggest some strengthening amendments. First, we ask that the Bill specify that species are to be listed as endangered or threatened solely on the basis of the best available biological and commercial data. This may best be accomplished by elimination of the requirement for an economic analysis of critical habitat designations. An alternative method would entail dropping the requirement that critical habitat be designated simultaneously with the listing.

Second, we are concerned that the Bill's amendments to Section 7 of the Act will result in increased numbers of apparent conflicts between conservation of a species and an economic project and thus damage both the individual species concerned and the program as a whole. In particular, we agree that a private permit applicant should be an active participant in defining the scope and timing of a §7 consultation, but said applicant should not be able to veto any extension of the 90-day period. Cutting off an ongoing consultation at this point may well result in the issuance of a jeopardy opinion because of the lack of knowledge - a lack that could be remedied by a month or so of further study. Premature jeopardy opinions would cause crises over apparent conflicts, many of which could have been resolved.

In addition, with regard to the §7 exemption process, S. 2309 assigns the fact-finding tasks of the present Review Board to the Secretary of Interior or Commerce. We oppose this step because it exposes the fact-finding process to political pressure, undermining confidence in its impartiality. The result will be increased conflict over projects undergoing the exemption process. We propose, instead, that this task be performed by a neutral official, perhaps an Administrative Law Judge.

The Colorado Natural Areas Council understands that §7(o) of the bill is intended to address the problem of a construction project which is determined not to cause jeopardy to a species but which may result in the death of individuals of such species. The language of S. 2309 is currently too broad, thus opening up the possibility that avoidable takings might occur. We urge the Committee to tighten the exemption to apply only to unavoidable takings occurring incidentally to the normal operation of the specific project.

Finally, we note that collecting of certain plants, especially cacti, alpine plants, and certain woodland herbaceous species, is a serious cause of depletion and eventual endangerment. Therefore, we request the Committee to adopt an amendment to prohibit collecting of listed species of plants.

The Colorado Natural Areas Council appreciates this opportunity to express its views on S. 2309. We offer our support in your efforts to enact a strong reauthorization measure.

Sincerely,

Kelly Jr.

Eric Kelly, Jr.
Chairman
Colorado Natural Areas Council

cc: Senators

Robert Stafford
Howard Baker
Pete Domenici
Alan Simpson
James Abnor
Steven Symms
Slade Gorton
Frank Murkowski

Jennings Randolph
Lloyd Bentsen
Quentin Burdick
Gary Hart
Daniel Patrick Moynihan
George Mitchell
Max Baucus

AMERICAN FUR INDUSTRY
INCORPORATED
101 West 30th Street/New York, N.Y. 10001/(212) 564-5133

STATEMENT OF THE AMERICAN FUR INDUSTRY, INC. BEFORE THE SENATE SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION OF THE SENATE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

APRIL 22, 1982

Mr. Chairman and Members of the Committee--I am Gary S. Kugler, Executive Vice-President, American Fur Industry, Inc. (AFI).

The AFI is comprised of manufacturers of fur apparel and processors and dressers of rawskins as well as the unions that represent the employees of these institutions. There are approximately 600 manufacturers within AFI. The AFI employs directly and indirectly 250,000 employees in the United States. The AFI fur products have always had a favorable balance of trade for the United States.

The thousands of people who comprise the AFI share a serious concern that professional standards for the scientific management of wildlife in order to protect and perserve this nation's wildlife be maintained. They naturally have a strong interest in the work of this subcommittee and the Congress in the reauthorization of the Endangered Species Act.

The AFI strongly endorses reauthorization of the Endangered Species Act. From the inception of the act AFI has supported its passage. As this subcommittee may be aware the labor agreements within the industry contain provisions that the parties will not work on endangered or threatened species. The industry has never requested an exemption under the act for a permit to work on endangered or threatened species.

The AFI appreciates the opportunity to submit this statement to the subcommittee on S.2309. We congratulate the subcommittee and the staff on its work. We believe positive steps have been taken which will improve the act and will afford to the implementing authorities the authority to administer the act effectively, in accordance with accepted wildlife management principles.

Specifically, the proposed change in Section 8 pertaining to standards to be utilized in determining a no detriment finding (in connection with CITES) on the survival of a particular species is welcomed. However, we believe that there should be a change in the language in the bill that now reads:

> Such determination [of no detriment] and advice shall be based upon the best available biological information derived from reliable wildlife management practices. The Secretary shall not be required to use estimates of population size in advising that export or introduction will not be detrimental to the survival of the species or determining that export should be limited when such estimates are not the best available biological information derived from reliable wildlife management practices.

> In lieu of the foregoing we suggest the following:

> Such determination [of no detriment] and advice shall be based upon existing biological information derived from accepted fish and wildlife conservation and management practices. The Secretary shall not be required to use estimates of population size in advising that export and introduction will not be detrimental to the survival of the species or determining that export should be limited.

It is our understanding from discussions with staff that by the word "available" they mean "existing". If so, we think the change is appropriate for the reason that "available" may be interpreted to encompass more than what exists at the time the Secretary makes his determination. It could be construed to mean "may be obtained" (usually only if the Secretary is required to readjust his priorities and redirect scarce resources).

The phrase "accepted fish and wildlife conservation and management practices" finds support in long standing (and therefore commonly understood) regulatory provisions implementing the Federal Aid to States in Fish and Wildlife Restoration Act (50 C.F.R. Subpart 80.1(g)).

We respectfully urge that the suggested changes have the advantages of stating what is intended and placing the standards for which a no detriment finding is to be based clearly within a historical (and understood) context of wildlife management principles.

The second suggested change concerns Section 3(5) where, in connection with the listing process, the phrase "and determinable" has been added with respect to the designation of critical habitat. We understand that the addition of the phrase "and determinable" is intended to afford the Secretary the opportunity to list a specie without at the same time designating critical habitat. We believe the change ill advised for these reasons:

(a) It is our understanding that one, if not the most significant factor, impacting upon a decline of a specie is the destruction of its critical habitat. Accepted wildlife management practices virtually mandate that critical habitat be protected. To afford the Secretary the opportunity not to make this determination (and therefore be subjected to the pull of other interests) we believe is unfortunate and does not implement accepted wildlife management principles. We further understand that the reason for this change is not because of any wildlife management concept but is an effort to resolve a preceived problem within the

Department of Interior pertaining to listing (or the failure to list). We believe it ill advised to resolve such a problem, if it exists, in this fashion.

(b) To list is to preempt State activities. In many instances States already have wildlife management programs in effect with respect to species that the Secretary may list. To preempt State actions with regard to the specie by listing, and then do nothing, e.g. to not designate critical habitat, in our opinion, does not improve the lot of the specie.

(c) If the Secretary takes the allotted time under the bill to determine that a specie is in such condition that it should be listed, it is inconceivable to us that the Secretary is also not in a position to determine what is critical habitat. Throughout the testimony of these proceedings there has been nothing offered, to our knowledge, to suggest that the Secretary has failed to list because he has been unable to determine critical habitat.

Mr. Chairman I would like to take this moment to comment also with regard to a licensing requirement imposed by the Secretary pursuant to the Endangered Species Act, found at 50 C.F.R., Part 14, Subpart I, §14.91. The provisions of Subpart 14 mandate that an import and export license be obtained for all individuals or entities involved in the exporting and importing of wildlife. In addition they are required to maintain records for five years and allow the Fish and Wildlife Service to inspect the records. It is our understanding that most of the statistics, data or other information obtained from keeping such records are not at all useful to wildlife managers. Although there is an exemption for individuals or entities that import or export annually less than $25,000.00 worth of wildlife the effect on those who are required to maintain a license is to unnecessarily increase red tape thereby needlessly increasing labor and other costs, which simply adds to the inflationary cycle. I should be quick to add, that for species listed pursuant to the Endangered Species Act or listed in the Appendices of CITES there need to be regulations and licensing requirements. We are not objecting to these.

Finally, in Section 9 the bill proposed to afford the Attorney General the opportunity to enjoin any person who is "alleged to be in violation" of any provision of the Act. This language we believe is rather curious. It suggests that "alleged violations" may be enjoined. Normally the extraordinary remedy of an injunction is only operative where an actual violation occurs. Moreover, the proposed language is open ended to the extent that the Attorney General could act upon an allegation from an irresponsible individual. We suggest that the language be changed to read "may seek to enjoin any person who is in violation of any provision..."

In conclusion we commend the Members of the subcommittee and staff in their efforts to develop legislation that requires that endangered and threatened wildlife be managed in accordance with accepted wildlife management principles.

STATEMENT OF ORREN MERREN, ESQ.
BEFORE THE SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION OF THE COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS UNITED STATES SENATE

Mr. Chairman and Members of the Subcommittee:

My name is Orren Merren and I am presenting this statement on behalf of the Government of the Cayman Islands, which is a minority shareholder in the Cayman Turtle Farm Limited (CTF) in addition to having responsibility for implementation and enforcement of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) within its jurisdiction. I am grateful to you for the opportunity to comment upon problems flowing from the manner in which the Endangered Species Act of 1973 (ESA) and CITES have been implemented under regulations pertaining to captive-bred green sea turtles. The Cayman Islands are a dependency of the United Kingdom and this effort also has the support of the British Government.

ESA declares the policy of Congress to conserve[1] threatened and endangered species and sets out as one of its purposes the implementation of CITES. 16 USC Sec. 1531. CITES provides for listing under Appendix I thereto "all species threatened with extinction which are or may be affected by trade", while Appendix II thereto is to include "all species which although not necessarily now threatened with extinction may become so unless trade in specimens of such species is subject to strict regulation in order to avoid utilization incompatible with their survival." CITES, Article II. The green sea turtle (Chelonia mydas) is now listed in Appendix I. 46 Fed. Reg. 44660 (Sep. 4, 1981) at 44669.

---

[1] The terms "conserve", "conserving" and "conservation" refer to the use of all methods and procedure (including scientific resources management such as research, census, habitat acquisition and maintenance, propagation, live trapping, transplantation, and may include regulated taking) which are necessary to bring threatened or endangered species to the point at which protective measures under ESA are no longer required. 16 USC Sec. 1532. This definition would encompass the methods and procedures of farming (i.e. captive-breeding) whether for commercial or noncommercial purposes.

Trade in Appendix II species is allowed when the conditions for an export permit have been met. CITES, Article IV. Trade in Appendix I species generally necessitates both an import and an export permit; one of the conditions for granting an import permit is satisfying the importing country's Management Authority that "the specimen is not to be used for primarily commercial purposes." CITES, Article III. However, Aricle VII (4) of CITES provides in relevant part: "Specimens of an animal species included in Appendix I bred in captivity for commercial purposes... shall be deemed to be specimens of species in Appendix II." (emphasis added). Article VII (5) of CITES provides further that where the exporting country's Management Authority is satisfied that any specimen of an animal species was bred in captivity or is a part derived therefrom, "a certificate by that Management Authority to that effect shall be accepted in lieu of any of the permits or certificates" otherwise required under CITES. Nothing in ESA purports to negate the effects of Article VII (4) and (5) of CITES. Thus, in the absence of stricter measures taken pursuant to regulations issued under ESA, green sea turtle products derived from species bred in captivity for commercial purposes and so certified by the Management Authority of the exporting country could be traded in compliance with CITES and ESA.

The farming of captive-bred species may be defined as "the exploitation of animals produced under systems in which the entire life-cycle takes place in controlled environments." In contrast, ranching refers to "the exploitation of animals produced under systems in which a signifcant part, but not all, of the life-cycle takes place in a substantially controlled environment and in which the wild living phase takes place in a definable geographical area." M.R. Brambell, a paper on ranching submitted to the Third Conference of Parties to CITES in New Delhi, India, 1981.

CTF operates a closed-cycle, self-sustaining farm. It ceased taking eggs and turtles from the wild in March, 1978, and Semptember, 1977, respectively. As such, CTF is capable of supplying specimens of captive-bred species in lieu of illegal taking from the wild to meet world demand for green sea turtle products.

From a policy perspective, once it is accepted that farming is a desirable means to preserve a threatened or endangered species, making the conditions for "captive-bred" status under CITES less rather than more difficult to achieve would be appropriate. Thus, to encourage successful farming operations, trade of Appendix I species "bred in captivity for commercial purposes" as if they were Appendix II species should not be impeded by unneccessarily burdensome regulations.

Since 1975, CTF has been producing turtles from sexually mature farm hatchlings. Hence, under appropriately framed regulations, it would be able to trade legally under CITES both its first and second generation captive-bred stock. It has and will continue to maintain an adequate stock of breeders and also to release into the wild all farm hatchlings in excess of CTF's internal requirements.

The British Government has accepted CTF's operation as now satisfying the criteria of the Parties to CITES for captive-breeding. Most other Parties to CITES, except the United States, have adopted a similar approach.

Regulations now governing green and other sea turtles (the Turtle Regulations) are contained in 50 CFR part 17 and parts 222 and 227. For the purposes of ESA, Chelonia mydas is listed as "threatened" except for breeding colony populations on the Florida coast and on the Pacific coast of Mexico where the species is listed as "endangered".[2]

Although not compelled to do so by the terms and policy of ESA or CITES, the Secretaries of Commerce and Interior have exercised their discretion under 16 USC Sec. 1533 (d) to bring into effect with respect to "threatened" species the prohibitions under 16 USC 1538 (a) with respect to "endangered" species, including prohibitions of transshipment through United States ports. 50 CFR Sec. 17.31 (a) and Sec. 227.71. With respect to green and other sea turtles, the Turtle Regulations provide for permits granting exceptions from these prohibitions only for scientific puroses, enhancement of propagation or survival, zoological exhibition, or educational purposes. 50 CFR Sec. 17.42 (b) (2) and Sec. 227.72.

---

[2] An "endangered species" is defined as one which is in danger of extinction throughout all or a significant portion of its range, whereas a "threatened species" means one which is likely to become an endangered species within the foreseeable future. 16 USC Sec. 1532.

There is no provision whatsoever for a mariculture exemption allowing the specimens of "threatened" species bred in captivity for commercial purposes to be traded under CITES or otherwise. However, live "endangered" species which are captive-bred in the United States, though having a natural geographical distribution outside this country, may be traded commercially under certain conditions. 50 CFR Sec. 1721 (g).

CTF sought to enjoin enforcement of the Turtle Regulations insofar as they were directed against commercial mariculture activites. However, a final injunction was not issued, since it was determined that the action of the administrative agencies was authorized under ESA and was not so "arbitrary, capricious or an abuse of agency discretion" as to satisfy the standards for it to set aside the regulations. Cayman Turtle Farm v. Andrus 478 F.supp. 125 (D.D.C. 1979), aff'd mem., No. 792031 (D.C. Cir., Dec. 12, 1980). However, the power of the administrative agencies to issue the regulations proposed in 1975 which provided for trade in captive-bred species was not questioned.

The Turtle Regulations have caused CTF severe economic injury, which now threatens the survival of the world's only successful sea turtle farming operation. To keep the operation going under present conditions, the Government of the Cayman

Islands has had to subsidize substantially CTF's sizeable operating and research budget. However, given the limited resources of the Cayman Islands which has a population of only 17,000, such a subsidy cannot continue indefinitely. Thus, if the Turtle Regulations are not altered to allow a mariculture exemption, it is probable that CTF's ongoing contribution to research and conservation of sea turtles will terminate.

The Government of the Cayman Islands is encouraged by the spirit of President Reagan's Caribbean Basin Initiative, which favors the promotion of economic development through private enterprise. CTF exemplifies such a venture which is struggling to survive in the wake of adverse regulations imposed by the Government of the United States during the Carter Administration. Prior to the ban on importation of maricultured turtle products into the United States, CTF provided the main export of goods to the United States. If the Cayman Islands are designated as a "beneficiary country" under an enactment along the lines of the proposed Caribbean Basin Economic Recovery Act, then a change in the Turtle Regulations would be a necessary prerequisite for that territory to benefit significantly in terms of the duty-free trade incentives.

The Government of the Cayman Islands also takes note of Congressional policy expressed in the National Aquaculture Act of 1980. Under it, the Secretaries of Commerce and Interior are mandated to encourage the development of private commercial aquaculture[3] enterprises. 16 USC Sec. 2084 (a)(3). They are also mandated to identify and list State and Federal regulations restricting the development of commercial aquaculture operations and then to formulate an action plan containing specific steps to remove unnecessarily burdensome regulatory barriers to the initiation and operation of commercial aquaculture ventures. More specifically with respect to ESA, the Senate report states that the Secretaries are to determine which species have significant potential for culturing "without regard to their possible threatened or endangered status in the wild." S.Rep. No. 660, 96th Cong., 2d Sess. 9 (1980).

Thus, for domestic purposes, the policy expressed by Congress strongly favors the concept and practice of commercial aquaculture ventures and urges the removal of unnecessarily burdensome regulatory barriers to their successful operation. For the United States to continue maintaining the agencies' position set forth in the Turtle Regulations would imply that the United States disfavors commercial aquaculture ventures abroad and wishes to impede their operation by issuing adverse regulations.

In light of the policies expressed in the National Aquaculture Act of 1980 and otherwise, the Government of the Cayman Islands requests that the Subcommittee consider including the

---

3. The term "aquaculture" is defined as the propagation and rearing of aquatic species in controlled or selected environments, including, but not limited to, ocean ranching (except private ocean ranching of Pacific salmon for profit in those States where such ranching is prohibited by law). 16 USC Sec. 2802 (1) This definition would encompass farm-reared green sea turtles as well as other aquatic species which are bred in captivity for commercial purposes.

following language in its report on reauthorization of ESA:

> Congress recognizes the desirability of establishing and maintaining programs for the conservation of threatened or endangered species through operations involving ranching, captive-breeding, farming, and artificial propagation. Consonant with the provisions of the Convention on International nal Trade in Endangered Species of Wild Fauna and Flora, Congress encourages regulations to permit trade in such species where the trading enterprise, whether commercial or noncommercial, makes a significant contribution to the conservation and propagation of threatened or endangered species.

THE GARDEN CLUB OF AMERICA
598 MADISON AVENUE, NEW YORK, N. Y. 10022
TELEPHONE (212) 753-8287

PRESIDENT
MRS. SAMUEL M. BEATTIE

NATIONAL AFFAIRS AND LEGISLATION COMMITTEE
CHAIRMAN
MRS. ROBERT H. GLORE
550 N. MAYFLOWER ROAD
LAKE FOREST, IL 60045

STATEMENT OF THE GARDEN CLUB OF AMERICA ON S 2309 THE ENDANGERED SPECIES ACT AMENDMENTS OF 1982

April 20, 1982

The Garden Club of America, a private non-profit organization with member clubs from coast to coast and in Hawaii, was founded in 1913 and has a long history of involvement in conservation issues. A primary concern is the protection of native flora and fauna. Therefore, we are grateful for the opportunity to present our views on S.2309, the Endangered Species Act Amendments of 1982, and we respectfully request that this document be added to the transcript of the hearings.

We congratulate the Senate Subcommittee on Environmental Pollution, Committee on Environment and Public Works, and its Chairman, Senator John H. Chafee, for the thorough and fair hearings which have been held.

We also wish to praise the three sponsors of S.2309, Senators Chafee, Mitchell and Gorton, for presenting legislation which generally maintains the commitment to conserve endangered species. We are grateful that S.2309 continues to recognize the importance of protecting plants. We feel that the Endangered Species Act has been working well and, therefore, are opposed to major legislative modifications. We strongly urge the Committee to reject any weakening amendments.

We deplore the fact that the present Act has been emasculated by budget cuts and by the revised method of listing species according to classification of "higher" or "lower" forms of life. Critical habitat acquisitions have been curtailed or cancelled without consideration that many plant species can be saved only by the preservation of their special habitat.

Once a plant species is extinct, the potential contained in that gene pool is lost forever. A diversity of plant species is required to guarantee the future quality of human life and to maintain the ecological stability of the biosphere. All animals, including man, are dependent on plants for food and for survival. Hardy wild strains are important genetic reservoirs for the new agricultural varieties grown today and to be grown tomorrow. If their wild relatives are not preserved to rejuvenate or replace them when they become vulnerable to disease or pests, the ensuing disaster could bring starvation to large populations of the human race.

Almost half of our present day medicines contain drugs of organic origin, which cannot be synthesized in the laboratory. Only five percent of the world's plant species so far has been studied for pharmaceutical use, and every day there vanishes from the world a plant species which might have proved to be an important medical source for the treatment of cancer or other ailments of man.

The Garden Club of America has a long, consistent history of concern for our threatened wild plants and animals. Our members, who are leaders in their communities, are actively involved in educating the public to preserve and protect our endangered species. We work with botanic gardens, nature preserves, the schools and local and state officials. From a wide background of experience, we make the following comments on S.2309:

Section 5: Exemption Process

S.2309 transfers to the Secretary of the Interior or Commerce the task of establishing the facts in a case of alleged conflict between protecting a species and carrying out an economic project. We feel this would expose the fact finding process to political pressure. The fact finding task should be assigned to a politically neutral administrative law judge.

Section 6: Consultation Process

We strongly oppose the provision permitting a private company to veto any extension of the 90 day period during which a land-owning agency consults with the U. S. Fish and Wildlife Service or the National Marine and Fisheries Service concerning the impact of a project on a listed species or its habitat. Private companies should not be granted control over Federal agencies.

Section 6 (b): Basis For Determination

We agree that enforceable time limitations should be placed on listing and that scientific input into the listing process should be increased.

S.2309 does not separate the listing process from evaluations of economic conflicts. We agree with Chairman John B. Breaux of the House Subcommittee on Fisheries and Wildlife Conservation and the Environment that economic considerations must be eliminated from the listing process, which should rely solely on biological data.

We firmly support Rep. Thomas B. Evans, Jr. in his recommendation to promote better implementation of the Western Hemisphere Convention and feel that the Senate should consider this.

We support the amendment to S.2309 testified to by Dr. Faith Campbell of the Cooperating Organizations, which would require a permit for collecting listed plant species in order to possess them or grow them. Rarity increases the value of plants, often making them more eagerly desired. Such a permit would strengthen protection of listed species.

The Garden Club of America works with dedication to protect our endangered species. However, it is our conviction that widespread involvement by the private sector cannot alone provide sufficient protection for endangered species. A strong law is needed to reinforce educational endeavors and voluntary efforts.

The Garden Club of America firmly believes that neither regulatory reform nor budgetary considerations should interfere with the preservation of the diversity of species. The genetic heritage of the world is of basic significance to every human being. We plead with the Congress to reauthorize the Endangered Species Act for three years, without weakening amendments, and to fund it adequately so that it may be properly implemented.

Mrs. Robert Hixon Glore
Chairman
National Affairs & Legislation

Prepared with the assistance of
Mrs. Peter R. Gallagher
Vice Chairman, Endangered Species
Horticulture Committee

STATEMENT

of the

NATIONAL CATTLEMEN'S ASSOCIATION

before the

SUBCOMMITTEE ON ENVIRONMENTAL POLLUTION

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

UNITED STATES SENATE

Regarding

Endangered Species Act

Presented by

Ronald A. Michieli

Vice President, Natural Resources

March 8, 1982

The National Cattlemen's Association is the national spokesman for all segments of the nation's beef cattle industry -- including cattle breeders, producers, and feeders. The NCA represents approximately 245,000 professional cattlemen throughout the country. Membership includes individual members as well as 52 affiliated state cattle associations and 20 affiliated national breed organizations.

Mr. Chairman:

The National Cattlemen's Association represents beef cattle breeders, producers, and feeders across the nation.

We are concerned about the effect of the Endangered Species Act on our ability to produce food and fiber for the American people. We do not believe that the 1979 Amendments to the Act, which established an Endangered Species Committee that could provide certain exemptions, solved the problem that the Act has priority over all programs or national interests. Further changes are needed in Section 7 of the Act to introduce the rule of reason and practicality. We are still a long ways from creating a workable method for balancing the mandates of the Endangered Species Act with the goals of other laws and with the national goals for food and fiber production and for energy growth.

One of our main concerns is the failure to adequately define what is meant by the term "critical habitat." At the present time, critical habitat can include the entire geographical area which can be occupied by the threatened or endangered species. This leads to the naming of millions of acres - and even entire states - as critical habitat of one species or another. In most cases, such a large geographical area is not necessary or justified.

The naming of a critical habitat, of course, not only affects other federal actions or activities, it also has a huge impact on private lands and private actions. As a matter of fact, such a designation infringes upon private rights and actions without compensation to the private landowner for the damages and opportunity losses suffered by that private owner. In our opinion, the designation of a critical habitat on private lands constitutes a "taking" of the lands without compensation. We believe there should be some provision for compensating a private citizen when his livelihood is taken from him by operation of the Endangered Species Act.

The current Act does allow the Secretary of the Interior to make exceptions to the requirement that the critical habitat must include the entire geographical area which can be occupied by the threatened or endangered species. However, this provision should be strengthened to require the Secretary to consider adverse economic impacts and conflicting needs before a critical habitat is designated.

We also believe it should be made clear that the Endangered Species Act is not an attempt to halt the natural evolutionary process. Many of the reasons in the Act for protecting endangered species have to do with natural causes rather than man's activities. If we attempt to "fool Mother Nature," we will be adding layer upon layer of species, and layer upon layer of "critical habitats," windling up with a contradictory protection program that is unworkable. We also would be unnaturally preventing the natural evolution of new species.

We sincerely hope that this subcommittee will give serious consideration to amending this Act so as to introduce some standard of common sense and reasonableness to the endangered species program.

National Sharecroppers Fund

Post Office Box 1029
Pittsboro, North Carolina 27312 USA
(919) 542-5292

March 17, 1982

Dear Senator:

Enclosed you will find testimony on behalf of the National Sharecroppers Fund in regards to the Endangered Species Act that is currently being considered in the Senate Committee on Environment and Public Works.

We sincerely hope that the information presented in this testimony will be given very serious attention before any decision about the future of the Act is reached by the Committee.

Please do not hesitate to contact me if you desire further clarification or information about any aspects of this testimony.

Sincerely,

Cary Fowler

Cary Fowler
Program Director

TESTIMONY BY CARY FOWLER

on behalf of

THE NATIONAL SHARECROPPERS FUND

before

THE HOUSE MERCHANT MARINE
and FISHERIES COMMITTEE

on: The Endangered Species Act

March 8, 1982

By way of introduction, the National Sharecroppers Fund is a 45-year old non-profit organization. We were founded by Dr. Frank Porter Graham, a former U.S. Senator, and others during the Depression to give assistance to southern tenant farmers and sharecroppers. Today we see our mission as serving and promoting the well-being of the family farm. To this end we conduct agricultural research. We offer training programs for small farmers. We offer assistance to various farm organizations and we produce a variety of educational materials.

On October 1 of this year, the Endangered Species Act will lapse unless reauthorized by the President and Congress. The Act protects endangered plant and animal species in a number of concrete ways.

Supporters of the Act argue that rare species are an important part of a healthy ecosystem. Those who wish to weaken the Act point to the economic costs of preservation.

The National Sharecroppers Fund is concerned about the Endangered Species Act, due to the relevance this Act has to agriculture.

Wild relatives of cultivated crops have often provided the plant breeder with genes for resistance to insects and diseases. They have helped breeders adapt crops to different cultural and climatic requirements and have helped improve the nutritional quality of crops. According to noted geneticist and crop scientist Dr. Jack Harlan of the University of Illinois, tomatoes "could not be grown commercially at all in the U.S." were it not for resistance plant breeders have acquired from wild species. And "the same is true for tobacco at least in the U.S.," according to Dr. Harlan. Potatoes have acquired resistance to eight major diseases from their wild relatives. And sugarcane has been completely salvaged as a commercial crop through the use of wild relatives in breeding programs. Clearly, the wild relatives of our cultivated crops constitute a virtually priceless resource which should be protected and preserved. If available and used, these wild relatives might potentially save farmers millions of dollars in the future through the production of better, more resistant crop varieties.

The Endangered Species Act could and should provide protection to the many rare and endangered wild relatives of our agricultural crops located within the U.S. Using data published in the December 15, 1980 Federal Register, plant scientist Gary Nabhan concluded that the Endangered Species Act could provide protection to over 100 species that are wild relatives of 44 agricultural crops. These crops include: beans, squashes, pumpkins, cotton, sunflower, Jerusalem artichokes, sisal, sweet potato, cassava. millet, avocado, cherry, plum, and potato. A copy of Nabhan's study, entitled "Wild Relatives of New World Crops Considered Endangered or Threatened Species in the United States" is attached as an appendix to this testimony.

We believe that the partial or total exclusion of plants from the Endangered Species Act or other measures designed to weaken the Act would increase the threat of extinction to these wild relatives of crops and would likely create greater burdens to agriculture in the future. Plant scientists and breeders from a number of universities and small seed company owners have expressed these views to the Department of the Interior in the form of a petition.

Plant breeders will tell you that the value of a wild relative to breeding programs of a particular crop cannot be accurately predicted before the need arises. We simply cannot be sure what needs plant breeders will be addressing ten or twenty years from now. Insuring that tomorrow's plant breeders will be able to meet such challenges requires us to preserve the crop genetic resources that constitute the building blocks of all breeding programs. Preserving the Endangered Species Act is one way of safeguarding these valuable and scarce resources.

We ask that you consider the potential impact of the Endangered Species Act on the future of agriculture and do all within your power to see that the effectiveness of this Act is maintained.

WILD RELATIVES OF NEW WORLD CROPS CONSIDERED
ENDANGERED OR THREATENED SPECIES
IN THE UNITED STATES

Introduction

The wild species belonging to the same *genus* of plants as a domesticated crop can potentially serve as a secondary gene pool for that crop, contributing resistance, hardiness or other qualities to it. For major crops, the transferrance of one "wild-type" gene for insect or disease resistance into commercial varieties has sometimes led to the savings of hundreds of thousands of dollars (formerly suffered in crop losses) by farmers. Although plant breeders are now responsible for most new transfers of genes from wild species to their domesticated relatives, this process has apparently occurred prehistorically and historically, where crops were grown adjacent to wild populations of plants with which they were cross-compatible.

Our concern here is that too few people realize that many potentially valuable wild relatives of crops are threatened or endangered *within* the United States and its territories. Too often, government reports give the impression that nearly all genetic resources lie in foreign countries, where we, as American citizens, are virtually powerless in encouraging their *in situ* protection. What tends to be overlooked is that there are over 100 wild species of plants related to New World crops that are currently threatened by extinction within our boundaries--few of their populations fall within nature conservancy areas, and hardly any have had some of their seeds collected for preservation in seed banks.

If one is concerned about plant extinction and its relation to human well-being, perhaps the following list of plants can provide a focus for action. There is an effort underfoot to drop plants from protection by the regulations established after the Endangered Species Act of 1973; it is critical that people immediately begin to lobby to keep plants under the jurisdiction of this Act, and to strengthen the botanical staff of the U.S. Fish and Wildlife Service's Endangered Species Program. It is also necessary to help establish and manage preserves or conservancy areas where populations of these species occur, and to fight landscape destruction which threatens their other habitats. Some state native plant societies have begun "Adopt a Plant" programs to help protect, propagate and reestablish endangered species. Finally, it is essential that we have a "back up" system, including collection and storage of viable seeds of these species, in case anything happens to remaining wild populations.

These data were assembled by overlapping three kinds of listings. The list of threatened and endangered plants used was that which appeared in the December 15, 1980 *Federal Register*. We have added a few to this list based on our own field observations and literature and herbaria searches; these and others not "officially" endangered are set off in parentheses. The choice of genera which included New World domesticated (not merely cultivated) crops was done utilizing sources such as: Robert L. Dressler's *The Pre-Columbian Cultivated Plants of Mexico* (Harvard University Botanical Museum Leaflets, Vol. 16, No. 6, 1953); Richard I Ford's "Gardening and Farming Before A.D. 100: Patterns of Prehistoric Cultivation North of Mexico" (*Journal of Ethnobiology*, Vol. 1, No. 1. 1981); and N. W. Simmond's *Evolution of Crop Plants* (Longman, London, 1976).

Finally, we checked for the species in the genera appearing on both kinds of lists in a winter, 1978 computer printout of species stored in the National Seed Storage Laboratory in Fort Collins, Colorado. If seeds of a species were stored in the NSSL, we have marked its listing with an asterisk--Very few of these are now stored in Fort Collins, although seeds or nursery stock may be available in other stations of the National Plant Germ Plasm System. We encourage others to help us refine this listing, and grant permission to reprint, distribute or utilize it in any way that potentially contributes to increased public awareness of the challenge ahead of us.

A Survey By
Gary Nabhan

SOUTHWEST TRADITIONAL CROP CONSERVANCY GARDEN AND
SEED BANK, A PROJECT OF MEALS FOR MILLIONS/
FREEDOM FROM HUNGER FOUNDATION SOUTHWEST
PROGRAM, 715 NORTH PARK AVENUE,
TUCSON, ARIZONA.

COMMON NAME OF NEW WORLD CROPS	SCIENTIFIC NAMES OF CROPS IN GENUS	ENDANGERED OR THREATENED WILD RELATIVES IN GENUS	STATES AND TERRITORIES WHERE FOUND
(parentheses indicate not an officia. list; * indicates in NSSL collections)			
Dwarf sisal	Agave angustifolia	A. arizonica	AZ
Cantala	A. cantala	A. chisoensis	TX
Henequen	A. fourcroydes	A. eggersiana .	VI
Pulque	A. mapisaga		
Pulque	A. salmiana	A. parviflora	AZ
Sisal	A. sisalana	A. schottii var. treleasei	AZ
Tequila	A. tequilana		
		A. toumeyana var. bella	AZ
		A. utahensis var. eborispina	CA, NV
		A. utahensis var. nevadensis	CA, NV
Grain amaranths	Amaranthus caudatus	A. brownii	HI
	A. cruentus		
	A. hypochondriacus		
Nance	Byrsonima crassifolia	B. horneana	PR
		B. ophiticola	PR
Jackbean	Canavalia ensiformis	C. centralis	HI
		C. forbesii	HI
		C. haleakalaensis	HI
		C. kauaiensis	HI
		C. kauensis	HI
		C. lanaiensis	HI
		C. makahaensis	HI
		C. molokaiensis	HI

COMMON NAME OF NEW WORLD CROPS	SCIENTIFIC NAMES OF CROPS IN GENUS	ENDANGERED OR THREATENED WILD RELATIVES IN GENUS	STATES OR TERRITORIES WHERE FOUND
(parentheses indicate not an offical list; * indicates in NSSL collections)			
		C. munroi	HI
		C. hualalaiensis	HI
		C. peninsularis	HI
		C. pubescens	HI
		C. rockii	HI
		C. stenophylla	HI
Huauzontle	Chenopodium berlandieri var nuttalliae	C. oahuense var. discospermum	HI HI
Quinoa	C. quinoa*	C. pekeloi	
Cañahua	C. pallidicaule		
Mexican hawthorn	Crataegus pubescens	C. berberifolia	TX
		C. harbisonii	AL, GA, TN
		C. stenosepala	TX
		C. sutherlandensis	TX
		C. warneri	TX
Calabash tree	Crescentia cujete	C. portoricensis	PR
Squashes and pumpkins	Cucurbita ficifolia*	C. okeechobeensis	FL
	C. maxima*	(C. texana)	TX
	C. mixta*		
	C. moschata*		
	C. pepo*		
Cotton	Gossypium hirsutum*	(G. tomentosum*)	HI
Sunflower	Helianthus annuus*	(H. anomalus)	AZ, UT
Jerusalem artichoke	H. tuberosus	H. carnosus	FL
		H. debilis ssp. vestitus	FL

COMMON NAME OF NEW WORLD CROPS	SCIENTIFIC NAMES OF CROPS IN GENUS	ENDANGERED OR THREATENED WILD RELATIVES IN GENUS	STATES AND TERRITORIES WHERE FOUND
(parentheses indicate not an official list; * indicates in NSSL collections)			
		(*H*. *deserticola*)	AZ, NV, UT
		H. *eggertii*	AL, KY, TN
		H. *exilis*	CA
		H. *glaucophyllus*	NC, TN
		H. *laciniatus* ssp. *crenatus*	NM
		H. *ludens*	
		H. *niveus* ssp. *tephrodes*	CA, AZ
		H. *nuttallii* var *parishii*	CA
		H. *paradoxus*	TN
		H. *praecox* ssp. *hirtus*	TX
		H. *praetermissus*	NM
		H. *schweinitzii*	NC, SC
		H. *smithii*	AL, GA
Sweet potato	*Ipomoea batatas**	*I*. *cardiophylla*	TX
		I. *egregia*	AZ
		I. *krugii*	PR
		I. *lemmonii*	AZ
Cassava	*Manihot esculenta*	*M*. *davisiae*	AZ
		M. *walkerae*	TX
Prickly pear	*Opuntia ficus-indica*	*O*. *arenaria*	NM, TX
		O. *basilaris*	CA
		var. *brachyclada*	
		& var. *longiareolata*	AZ
		& var. *treleasei*	AZ, CA
		& var. *woodburyi*	UT

COMMON NAME OF NEW WORLD CROPS	SCIENTIFIC NAMES OF CROPS IN GENUS	ENDANGERED OR THREATENED WILD RELATIVES IN GENUS	STATES AND TERRITORIES WHERE FOUND
(parentheses indicate not an official list; * indicates in NSSL collections)			
		O. *bigelovii* var. *hoffmanii*	CA
		O. *borinquensis*	PR
		O. *imbricata* vs. *argentea*	TX
		O. *munzii*	CA
		O. *parryii* var. *serpentina*	CA
		O. *phaeacantha*	AZ
		var. *flavispina*	
		& var. *mojavensis*	AZ, CA
		& var. *superbospina*	AZ
		O. *spinosissima*	FL, PR, VI
		O. *strigil* var. *flexospina*	TX
		O. *triacantha*	FL, PR, VI
		O. *whipplei* var. *multigeniculata*	AZ, NV, UT
		O. *wiginsii*	CA
Sonoran Millet	*Panicum sonorum* (or *P*. *hirticaule* var. *miliaceum* domesticate)	*P*. *Alakaiense*	HI
		P. *carteri*	HI
		P. *fauriei*	HI
		P. *hirstii*	GA, NJ
		(*P*. *hirticaule* var. *miliaceum* or *P*. *sonorum* wild)	AZ, CA
		P. *lithophilum*	GA, SC
		P. *niihauense*	HI
		P. *nudicaule*	AL, FL, MS

COMMON NAME OF NEW WORLD CROPS	SCIENTIFIC NAMES OF CROPS IN GENUS	ENDANGERED OR THREATENED WILD REALTIVES IN GENUS	STATES AND TERRITORIES WHERE FOUND
(parentheses indicate not an official list; * indicates in NSSL collections)			
		P. pinetorum	FL
		P. stevensianum	PR
Avocado	*Persea americana*	*P. borbonia* var. *humilis*	FL, CA
Tepary bean	*Phaseolus acutifolius**	*P. supinus*	AZ
Runner bean	*P. coccineus**		
Lima bean	*P. lunatus**		
Common bean	*P. vulgaris**		
Husk tomato	*Physalis ixocarpa**	*P. viscosa* var. *elliottii*	FL
Yellow sapote	*Pouteria campechiana*	*P. auahiensis*	HI
		P. rhynchosperma	HI
Devil's claw	*Proboscidea parviflora* var. *hohokamiana*	*P. sabulosa*	NM, TX
American plum	*Prunus americana*		
No. Am. cherry	*P. besseyi*		
No. Am. cherry	*P. pumila*	*P. geniculata*	FL
Capulin cherry	*P. serotina*	*P. havardii*	TX
	var. *capuli*	*P. maritima* var. *gravesii*	CT
		P. murrayana	TX
		P. texana	TX
Guayaba	*Psidium guajava*	*P. sintenisii*	PR
Guayabilla	*P. sartorianum*		

COMMON NAME OF NEW WORLD CROPS	SCIENTIFIC NAMES OF CROPS IN GENUS	ENDANGERED OR THREATENED WILD RELATIVES IN GENUS	STATES AND TERRITORIES WHERE FOUND
(parentheses indicate not an official list; * indicates in NSSL collections)			
Chia	*Salvia hispanica*	*S. blodgettii*	AK
		S. brandegei	FL
		S. greatae	CA
		S. penstemonoides	CA
Pepino	*Solanum muricatum*	*S. bahamense*	FL
Sunberry	*S. nigrum*	var. *rugelii*	
Lulo	*S. quitoense*	*S. carolinense*	
Potato	*S. tuberosum**	var. *floridanum*	LF
		& var. *hirsutum*	GA
		S. conocarpum	VI
		S. drymophilum	PR
		S. haleakalaense	HI
		S. hillebrandii	HI
		S. incompletum	HI
		S. kauaiense	HI
		S. mucronatum	PR, VI
		S. nelsonii	
		var. *thomasiae-folium*	HI
		S. sandwicense	HI
		S. tenuilobatum	CA
		S. woodburyi	PR
"Wild" Rice	*Zizania aquatica*	*Z. texana*	TX

**NATURAL
AREAS
ASSOCIATION**

**320 South Third Street
Rockford, Illinois 61108
815/964-6666**

21 April 1982

The Honorable John Chafee, Chairman
Senate Subcommittee on Environmental
Pollution
U.S. Senate
Washington, D.C. 20510

Dear Senator Chafee:

The Natural Areas Association, a non-profit organization currently having over 270 members involved in natural areas efforts at the local, state and federal levels, appreciates the opportunity to comment on the Endangered Species Act Reauthorization Bill (S. 2309). I request that this letter be made part of the official hearing record for the hearings held by the Subcommittee on Environmental Pollution, which you chair.

The goal of the Natural Areas Association is to foster the identification, preservation, protection, and management of natural areas and other elements of natural diversity through the application of techniques consistent with sound biological and ecological principles. The majority of the membership of the Natural Areas Association is involved in the process of identifying, evaluating, protecting and managing natural areas having elements of natural diversity of statewide or national significance. Types of natural heritage features that are legitimately included in natural areas programs are habitats of rare, endangered, relict, peripheral or otherwise significant species of plants and animals. Furthermore, many members in the Natural Areas Association are associated with programs which have been partially funded through the Endangered Species Act (particularly Section 6 (Cooperation with the States) and Section 15 (Authorization of Appropriations).

The goal of the Endangered Species Act is to stop man's eradication of entire species from the face of the earth. Species of plants and animals are the living components of the world, and interrelate in countless ways (many of which are understood, and many of which are not yet understood) that are of vital importance to their survival (including the survival of mankind) and to the survival of the natural communities in which they live. Because of this, one of the most immediate and pressing problems in the United States is the protection of the Endangered Species Act.

The Natural Areas Association joins the Endangered Species Act Reauthorization Coordinating Committee in thanking you and your colleagues, Senators Mitchell and Gorton, for sponsoring S. 2309. The bill generally assures continued strong legal protection for endangered and threatened species. In particular, we applaud its continued inclusion of all elegible species, including plants and invertebrates, foreign species, and separate populations of vertebrates. We appreciate the refusal to prohibit States from adopting their own, more restrictive, programs. Finally, we are grateful for the proposal to increase funding for Section 6 Cooperative Agreements for the conservation of endangered and threatened species of plants and animals. Many members of the NAA are managing projects funded through

Section 6 and have been directly involved in federal/state conservation projects for listed and proposed species of plants and animals, including habitat acquisition and protection. The total elimination of Section 6 funds to the States in the FY 82 budget has severely hampered, and in some cases abolished, state conservation efforts for endangered and threatened species of plants and animals.

We hope that the Committee on Environment and Public Works will be able to persuade the Appropriations Committee to provide adequate funding for this and other portions of the Endangered Species program.

While we recognize that some species may benefit from introduction of experimental populations, we believe that the primary emphasis must remain on conservation and restoration of natural populations in the habitats where they evolved.

The Natural Areas Association would like to suggest some strengthening amendments. First, we ask that the bill specify that species are to be listed as endangered or threatened solely on the basis of the best available biological and commercial data. This may best be accomplished by elimination of the requirement for an economic analysis of critical habitat designations. An alternative method would entail dropping the requirement that critical habitat be designated simultaneously with the listing.

Second, we are concerned that the bill's amendments to Section 7 of the Act will result in increased numbers of apparent conflicts between conservation of a species and an economic project and thus damage both the individual species concerned and the program as a whole. In particular, we agree that a private permit applicant should be an active participant in defining the scope and timing of a §7 consultation, but one should not be able to veto any extension of the 90-day period. Cutting off an on-going consultation at this point may well result in the issuance of a jeopardy opinion because of the lack of knowledge - a lack that could be remedied by a month or so of further study. Premature jeopardy opinions would cause crises of apparent conflicts, many of which could have been resolved.

In addition, with regard to the §7 exemption process, S. 2309 assigns the fact-finding tasks of the present Review Board to the Secretary of Interior or Commerce. We oppose this step as exposing the fact-finding process to political pressure and thus undermining confidence in its impartiality. The result will be increased conflict over projects undergoing the exemption process. We propose, instead, that this task be performed by a neutral official, perhaps an Administrative Law Judge.

The Natural Areas Association understands that §7(o) of the bill is intended to address the problem of a construction project which is determined not to cause jeopardy to a species but which may result in the death of individuals of such species. The language of S. 2309 is currently too broad, thus opening up the possibility that avoidable takings might occur. We urge the Committee to tighten the exemption to apply only to unavoidable takings occuring incidentally to the normal operation of the project.

Finally, the Natural Areas Association notes that collecting of certain plants, especially cacti, alpine plants, and certain woodland herbaceous species, is a serious cause of depletion. Therefore, we request the Committee to adopt an amendment to prohibit collecting of listed plant species.

The Natural Areas Association appreciates this opportunity to express our views on S. 2309. We offer our support in your efforts to enact a strong reauthorization measure.

Sincerely,

Harold K. Grimmett

Harold K. Grimmett
President

cc: Senators

Robert Stafford
Howard Baker
Pete Domenici
Alan Simpson
James Abdnor
Steven Symms
Slade Gorton
Frank Murkowski

Jennings Randolph
Lloyd Bentsen
Quentin Burdick
Gary Hart
Daniel Patrick Moynihan
George Mitchell
Max Baucus

TRAFFIC(U.S.A.)
WORLD WILDLIFE FUND-U.S.
1601 Connecticut Avenue NW
Washington, DC 20009

(202) 797-7901

May 3, 1982

Senator John Chafee
Subcommittee on Environmental Pollution
5229 Dirksen Senate Office Building
Washington, D.C. 20515

Dear Senator Chafee:

We respectfully submit the following testimony in support of a full 3-year reauthorization of the U.S. Endangered Species Act.

TRAFFIC(U.S.A.) - Trade Records Analysis of Flora and Fauna in Commerce - is a scientific, information gathering organization monitoring the international trade in wild animals and plants. We are a program of World Wildlife Fund-U.S. and a Specialist Group of the Species Survival Commission (SSC), International Union for Conservation of Nature and Natural Resources (IUCN).

Since our inception in April 1979, we have analyzed trade documents and published wildlife trade reports relating to the volume of trade in relation to species' status in the wild, violations of U.S. and foreign legislation, and trade routes. Our close working relationship with the Law Enforcement Division and Wildlife Permit Office of the Fish and Wildlife Service, Department of the Interior, and the Animal and Plant Health Inspection Service (APHIS), Department of Agriculture has given us a first hand opportunity to observe the working mechanisms of the U.S. Endangered Species Act.

TRAFFIC(U.S.A.)—Trade Records Analysis of Flora and Fauna in Commerce—is a program of World Wildlife Fund-U.S. and a Specialist Group of the Species Survival Commission of the International Union for Conservation of Nature and Natural Resources. It monitors the international trade in wild animals and plants.
Cable: PANDAFUND Telex: 64505

The U.S. Endangered Species Act is an important law for the preservation of endangered and threatened species worldwide. We believe the Act has proven to be extremely effective in benefiting endangered and threatened animals and plants in the U.S. and abroad.

Our information reveals that the United States consumes, by far, more wild animals and plants than any other country in the world, based on both volume and declared value. The U.S. annually imports over a half million each of live reptiles and birds, over 100 million tropical fish, and approximately 165 million plants. In addition, the U.S. imports over 150 million raw and manufactured items of wildlife each year. It has been argued that foreign species should be excluded from coverage by the Act. However, as the number one exploiter of wildlife and plant resources worldwide, the U.S. has a responsibility for identifying and preserving the endangered and threatened wildlife in other countries. Therefore, TRAFFIC(U.S.A.) strongly supports listing of foreign species under the Act.

The Endangered Species Act afforded protection to species threatened with extinction worldwide six years prior to the implementation of CITES by prohibiting commercial trade. The tables appended to this testimony show trade figures for certain species before their listing on the Act. For example, the spotted cats, once abundant throughout their range, became scarce in the 1960's because of their use in fur coats and other products. In 1968 alone, the U.S. imported 1,300 cheetah, 13,500 jaguar, and 129,000 ocelot skins, all species now listed as endangered under the Act.

The use of primates for biomedical and pharmaceutical research, the pet trade, and zoos provide additional examples of how trade has diminished the wild populations of several species. Between 1968 and 1972, over 17,000 primates subsequently listed as endangered or threatened under the Act entered the U.S. The U.S. imported over 1,850 chimpanzees between 1968 and 1976, prior to their listing in 1977.

Between 1966 and 1978, approximately 728,000 kilograms of wild sea turtle meat entered the U.S. Sea turtles are threatened with extinction for commercial use of many of their parts: the shell is carved into jewelry and ornaments, the skin is tanned for leather products, the meat is used for steak and soup, and the oil is used as a cosmetic base. By June 1978, the U.S. had designated all sea turtles as endangered or threatened, thus banning their commercial import in this country.

The listing procedure of the Act is critical not only to species native to the U.S., but also for foreign species. The scientific evidence collected for the Act has enabled several developing nations to identify species threatened with extinction within their countries. Many of these countries lack the resources needed to identify their own rare species or to establish trade controls. In a time when increasing numbers of species are vanishing every year, it is imperative that we secure information on foreign and U.S. species that are endangered or threatened either by trade, habitat destruction, or other factors. The listing process must continue at an accelerated rate, not a diminishing one.

In many cases, foreign studies sponsored under funds provided by the Act have spurred a host country to take further measures to conserve endangered and threatened species within their own country. For instance, the first comprehensive study of the African elephant was produced by Iain Douglas-Hamilton in a report contracted by the U.S. Fish and Wildlife Service (FWS). The contract included a study of the status and range of the African elephant in 35 countries where it is still found and an analysis of poaching operations. The report included a four-volume analysis by Ian Parker on international trade in ivory. As a result of this study, the IUCN developed and implemented a worldwide elephant action plan. In addition, CITES has adopted many of the recommendations made on how to indelibly mark raw elephant ivory to prevent illegal trade in poached tusks.

Under the Act, the FWS has funded several studies of endangered marine turtles. The FWS was a major sponsor of the World Conference on Sea Turtle Conservation held at the State Department in November 1979. Over 300 sea turtle experts attended the conference and developed a plan of action to save these rare and valuable animals. Several non-governmental organizations including the World Wildlife Fund-U.S. and the Center for Environmental Education are now funding projects identified at the conference as necessary for sea turtle conservation.

Thus, studies funded by monies from the Endangered Species Act have had a large effect on providing information and programs for preserving endangered animals found in other countries. In many cases, these studies spur the host country(ies) to take further protective measures for endangered species within their own country.

Two foreign plants have also benefited from protection under the Act. The Chilean false larch, a tree native to South America, was listed as threatened in 1979 to help stop the flow of timber from this tree into the U.S. Timber from the Chilean false larch is highly prized for its durability and was harvested illegally from national parks in Chile. The Guatemalan fir, also listed as threatened in 1979, was dissappearing due to Central American lumber exports to the U.S. and other countries, in addition to its local use as firewood and Christmas trees. Once common, the tree is now threatened with extinction.

Listing of foreign species should continue. At the present time, several foreign plants and animals are candidates for listing. Most have been under review for several years now. The African elephant and sea turtles examples cited previously provide support in listing foreign species.

Listing of plant species has always lagged far behind listing of animal species. For foreign plants, this problem is particularly acute. The U.S. annually imports nearly 10 million cacti and 200,000 orchids, including over 600 species of cacti and 1,000 species of orchids. In light of such large numbers, is is probable that many wild-collected plants native to other countries end up in U.S. commerce.

Included in the above import figures are well over 8,000 specimens of Mexican cacti, including the Mexican living rock cactus, the aztec cactus, and the pinecone cactus, all considered extremely rare by the Mexican authorities, but not yet proposed for listing under the Act. Also common in U.S. horticultural trade are several species of cycads, native to South Africa and considered as endangered or threatened by the IUCN, and many species of rare South American and Asian orchids. Biologists suspect that many of these are collected from wild populations, thus posing a threat to potentially valuable plants native to other countries.

Even today, many foreign endangered and threatened animals are listed on the Act that are not protected adequately by CITES. For example, a yacare caiman, Caiman crocodilus yacare, is listed as endangered under the Act. While the U.S. does not allow commercial import of skins and manufactured products of this subspecies, thousands of raw skins of the endangered yacare caiman are entering Europe and Japan because the subspecies is not listed on CITES Appendix I.

Endangered species listed under the Act receive more protection than do CITES-listed species. Indeed, listing of traded species under the Act has sometimes led to successful species' recoveries. CITES does not afford this type of protection. One successful recovery program followed the listing of the American alligator as endangered in 1973. State-managed programs, funded in part by the Act, have brought populations back to sufficient numbers so that today, commercial trade in skins of the American alligator is once again possible.

Another very important distinction between those species listed on Act and CITES is that the Endangered Species Act protects native endangered and threatened species from interstate trade, a problem not addressed by CITES. Particularly important here are the 51 native endangered and threatened plants already listed under the Act. Nearly half of these plants are currently threatened by trade. Examples include the Chapman rhododendron, the green pitcher plant, and the 21 native cacti. Plants currently candidates for listing that are also threatened by trade include over 60 cactus species, 25 orchid species, 17 mariposa lilies, 6 pitcher plants, the Venus flytrap, and 10 species of hibiscus. Their listing would prevent interstate trade in wild specimens of these potentially endangered species.

Even those native plant species desired for commercial trade and listed under the Act fail to receive adequate protection since the Act only controls interstate trade of plant species and does not address their taking or intrastate trade. This means an endangered plant can be uprooted and transferred or sold throughout any one state without penalty under the Act. TRAFFIC(U.S.A.) supports strong taking controls on threatened or endangered plants, especially for those growing on public lands and those threatened by taking for the horticultural trade.

TRAFFIC(U.S.A.) also strongly supports the listing of endangered and threatened species regardless of their taxonomic classification or their "value" to humanity. Species are no more nor less endangered depending on their taxonomic hierarchy. Because of many environmental factors and trade pressures, many so-called lower plant and animal forms are severely threatened. These include species of butterflies, shells, corals, reptiles, cacti, and orchids, and insectivorous plants.

Finally, it is essential to continue implementation of CITES under the Act as a major tool for international species' conservation and monitoring. The Scientific and Management Authorities here in the United States provide a strong leadership role worldwide, and set examples on how other countries can best implement the international trade convention, CITES.

In summary, TRAFFIC(U.S.A.) supports:

- continued and increased listing of foreign species of plants and animals under the Act;
- increased protection from taking and intrastate trade as these terms refer to plant species;
- continued listing for all endangered and threatened plant and animal species, regardless of their taxonomic ranking or their potential economic value; and
- continued strong implementation of CITES under the Act.

Thank you for the opportunity to submit these comments.

Sincerely,

Linda McMahan, Ph.D.
Acting Director

David S. Mack
Assistant Director

LIVE PRIMATES IMPORTED INTO THE U.S. BETWEEN 1968 AND 1972, AND SUBSEQUENTLY CLASSIFIED AS ENDANGERED UNDER THE ENDANGERED SPECIES ACT

	QUANTITY IMPORTED
LEMURIDAE	
Cheirogaleus spp. (dwarf lemurs)	3
Hapalemur spp. (gentle lemurs)	3
Lemur spp. (lemurs)	114
Lepilemur spp. (sportive lemurs)	1
Microcebus spp. (mouse lemurs)	17
INDRIIDAE	
Propithecus spp. (sifakas)	11
CALLITRICHIDAE	
Callimico goeldii (Goeldi's marmoset)	179
Leontopithecus spp. (golden tamarins)	349
Saguinus oedipus [=*geoffroyi*] (cotton-top tamarin)	13,749
CEBIDAE	
Alouatta palliata [=*villosa*] (mantled howler)	362
Cacajao spp.	214
Chiropotes albinasus (white-nosed saki)	28
Saimiri oerstedii	6
CERCOPTHECIDAE	
Cercocebus torquatus (white-collared mangabey)	35
Cercopithecus diana (Diana or roloway monkey)	99
Macaca silenus (lion-tailed macaque)	20
Nasalis larvatus (proboscis monkey)	20
Papio [=*Mandrillus*] *leucophaeus* (drill)	9
Papio [=*Mandrillus*] *sphinx* (mandrill)	57
Pygathrix nemaeus (douc langur)	35
HYLOBATIDAE	
Hylobates spp. (gibbons and siamangs)	753
Gorilla gorilla (gorilla)	26
Pan spp. (chimpanzees)	1,171
Pongo pygmaeus (orangutan)	4

Source: *Mammals Imported into the United States in 1968* (*1969, 1970, 1971, 1972*), *Special Scientific Reports - Wildlife Nos. 137, 147, 161, 171, and 181*, Fish & Wildlife Service, U.S. Department of the Interior.

LIVE BIRDS IMPORTED INTO THE U.S. BETWEEN 1968 AND 1972, AND SUBSEQUENTLY CLASSIFIED AS ENDANGERED UNDER THE ENDANGERED SPECIES ACT

	QUANTITY IMPORTED
STRUTHIONIFORMES	
Struthio camelus spatzi (Western African ostrich)	306
Struthio camelus syriacus (Arabian ostrich)	
PELECANIFORMES	
Pelecanus occidentalis (brown pelican)	116
CICONIIFORMES	
Ciconia ciconia boyciana (white oriental stork)	23*
ANSERIFORMES	
Branta canadensis leucopareia (Aleutian Canada goose)	65*
Branta sandvicensis (Hawaiian goose, nene)	112
FALCONIFORMES	
Vultur gryphus (Andean condor)	11
Harpia harpyja (harpy eagle)	9
Falco peregrinus anatum (American peregrine falcon)	463*
GALLIFORMES	
Macrocephalon maleo (Maleo megapode)	4
Colinus virginianus ridgwayi (masked bobwhite)	2,402*
Crossoptilon mantchuricum (brown-eared pheasant)	3
Syrmaticus mikado (mikado pheasant)	4
GRUIFORMES	
Grus monacha (hooded crane)	12
CHARADRIIFORMES	
Himantopus himantopus knudseni (Hawaiian stilt)	7*
COLUMBIFORMES	
Columba palumbus azorica (Azores wood pigeon)	2
PSITTACIFORMES	
Aratinga guarouba (golden parakeet)	106
Amazona guildingii (St. Vincent parrot)	19
Amazona imperialis (imperial parrot)	7
Amazona leucocephala (Cuban or Bahaman parrot)	4
Amazona vinacea (vinaceous-breasted parrot)	208
Neophema pulchella (turquoise parakeet)	63
Neophema splendida (scarlet-chested parakeet)	124
Pionopsitta pileata (red-capped parrot)	1,713

* May include other non-endangered subspecies

LIVE BIRDS IMPORTED INTO THE U.S. BETWEEN 1968 AND 1972, AND SUBSEQUENTLY CLASSIFIED AS ENDANGERED UNDER THE ENDANGERED SPECIES ACT
(continued)

	QUANTITY IMPORTED
TROGONIFORMES	
Pharomarchus mocinno mocinno (resplendent quetzal)	44*
CORACIIFORMES	
Rhinoplax vigil (helmeted hornbill)	2
PASSERIFORMES	
Carduelis (=*Spinus*) *cucullatus* (red siskin)	20
Pyrrhula pyrrhula murina (San Miguel finch)	589*
Picathartes gymnocephalus (white-necked rockfowl)	24
Leucopsar rothschildi (Rothschild's starling)	57

* May include other non-endangered subspecies

Source: *Birds Imported into the United States in 1968* (*1969*, *1970*, *1971*, *1972*), *Special Scientific Reports - Wildlife Nos.* 136, 148, 164, 170, 193, Fish and Wildlife Service, U.S. Department of the Interior.

LIVE REPTILES IMPORTED INTO THE U.S. IN 1970/1971, AND SUBSEQUENTLY CLASSIFIED AS ENDANGERED UNDER THE ENDANGERED SPECIES ACT

	QUANTITY IMPORTED
ALLIGATORIDAE	
Alligator sinensis (Chinese alligator)	1
Caiman crocodilus apaporiensis (Apaporis river caiman) and *Caiman crocodilus yacare* (yacare caiman)	249,208*
Melanosuchus niger (black caiman)	8
CROCODYLIDAE	
Crocodylus acutus (American crocodile)	73
Crocodylus moreletti (Morelet's crocodile)	2
Crocodylus niloticus (Nile crocodile)	8
Crocodylus porosus (saltwater crocodile)	37
Osteolaemis tetraspis osborni (African dwarf crocodile)	49*
Tomistoma schlegelii (tomistoma)	90
CHELONIIDAE	
Caretta caretta (loggerhead sea turtle)	1
Chelonia mydas (green sea turtle)	906
Eretmochelys imbricata (hawksbill sea turtle)	2
Lepidochelys olivacae (olive ridley sea turtle)	480
EMYDIDAE	
Batagur baska (river terrapin = tuntong)	1
Geoclemmys (=*Damonia*) *hamiltoni* (spotted pond turtle)	23
Geomyda tricarinata (three-keeled Asian turtle)	1
PELOMEDUSIDAE	
Podocnemis expansa (South American river turtle)	127,424⁺
VARANIDAE	
Varanus bengalensis (Bengal monitor)	1,062
Varanus griseus (desert monitor)	37
Varanus flavescens (yellow monitor)	19
BOIDAE	
Epicrates inornatus (Puerto Rico boa)	7
Python molurus molurus (Indian python)	1,046*

*May include other non-endangered subspecies
⁺May include other non-endangered *Podocnemis* species

Source: *Amphibians and Reptiles Imported into the United States*, by Stephen D. Busack. Wildlife Leaflet 506, National Fish and Wildlife Laboratory, Fish and Wildlife Service, U.S.D.I., 1974.

REPTILE PRODUCTS IMPORTED INTO THE U.S. IN 1970/1971, OF SPECIES SUBSEQUENTLY CLASSIFIED AS ENDANGERED UNDER THE ENDANGERED SPECIES ACT

	leather products (items)	skins (pieces)	meat (lbs.)	calipee & oil (lbs.)
CROCODILIANS:				
Melanosuchus niger (black caiman)	----	5,588	----	----
Crocodylus niloticus (Nile crocodile)	861	69	----	----
Crocodylus porosus (saltwater crocodile)	4	----	----	----
TURTLES:				
Chelonia mydas (green sea turtle)	74	5,502	200,900	27,695
Lepidochelys olivacea (olive ridley sea turtle)	----	47,302	----	----
LIZARDS:				
Varanus bengalensis (Bengal monitor lizard)	4,213	----	----	----
SNAKES:				
Python molurus molurus (Indian python)	1,435*	----	----	----
TOTAL	8,839	58,461	200,900	27,695

*May include other non-endangered subspecies

Source: Amphibians and Reptiles Imported into the United States, by Stephen D. Busack. Wildlife Leaflet 506, National Fish and Wildlife Laboratory, Fish and Wildlife Service, U.S.D.I., 1974.

WESTERN STATES WATER COUNCIL
220 South 2nd East / Suite 200 / Salt Lake City, Utah 84111 / Phone (801) 521-2800

April 26, 1982

The Honorable John H. Chafee
United States Senate
Russell Building, Room 3103
Washington, D.C. 20510

Dear Senator Chafee:

The Western States Water Council finds that, in general, the provisions of S.2309, 97th Congress, are steps in the right direction for the amendment of the Endangered Species Act, especially those provisions of the bill which would amend Sections 4 and 7 of the Act. However, the Council believes that S.2309 does not go far enough in restoring a reasonable balance between the equally important national objectives of economic development and the conservation of endangered or threatened species. Specifically, the Council urges that S.2309 be amended to reflect the recommendations contained in the Council's position adopted on July 31, 1981 concerning the Endangered Species Act, a copy of which is attached.

Barring a satisfactory resolution of the issues which need to be addressed, the Council recommends that there be a simple one-year reauthorization of the Endangered Species Act.

Sincerely yours,

Charles E. Nemir
Chairman

Enclosure

/js

POSITION STATEMENT
of the
WESTERN STATES WATER COUNCIL
at Coeur d'Alene, Idaho
July 31, 1981
concerning the
ENDANGERED SPECIES ACT

The Western States Water Council, comprised of representatives of the governors of 12 western states, has carefully considered the present administration of the Endangered Species Act as previously constructed and interpreted. While recognizing the value to the nation of protecting our endangered and threatened species, various member states of the Western States Water Council have experienced serious problems with the Act which demonstrate critical flaws that require legislative and administrative remedies. The Endangered Species Act, as previously constructed and implemented, has in several cases thwarted effective state water resource development, and threatens to continue to do so in the future even as the western states' limited water resources become increasingly important in meeting essential national needs. Therefore, the Western States Water Council urgently requests that the 97th Congress of the United States and the Reagan Administration carefully reconsider the provisions of the Act and its implementation, and seriously consider the following problems and recommendations for amending the Act and improving its administration to more effectively and efficiently meet express national goals.

CONGRESSIONAL PURPOSE

Problem: The Supreme Court in TVA v. Hill found that the legislative intent of Congress in enacting the Endangered Species Act of 1973 "was to halt and reverse the trend towards species extinction, whatever the cost." Congress evidently disagreed, and subsequently enacted amendments intended to provide the flexibility necessary to allow a balancing of endangered species values with other national needs. However, such measures have only partially achieved the intended flexibility.

Recommendations: Congressional purpose and policy should be redefined explicitly in Section 2 to state that the conservation of endangered and threatened species should not automatically be undertaken at all costs, but should be considered in concert with other national goals.

LISTING OF SPECIES AND DESIGNATION OF CRITICAL HABITAT

Problem: Delay and uncertainty with respect to the listing of species and designation of critical habitat have significant economic impacts which need to be more fully addressed by the Act. Further, such actions have been criticized in the past as based on political rather than scientific factors.

Recommendations: The listing of a species and the designation of its critical habitat should be effected promptly and concurrently, based on existing and readily available information. Further, a forum should be established wherein conflicts over judgments with respect to biological facts can be challenged and resolved. Adjustments could easily be made under the present promulgation process at such time as more accurate information became available. The two year time period provided between initial notice of a proposed listing and final publication of regulations should be reduced. Critical habitat should be designated by the Secretary only after providing ample opportunities for official state comment by the respective governor. Such designation should also follow the required economic impact statement.

RECOVERY

Problem: The Act provides that endangered or threatened species be protected from such natural factors as disease and predation. Recovery plans are to be prepared and implemented in order to stabilize threatened species populations without addressing the physical and economic feasibility of such recovery efforts.

Recommendations: The complete conservation of all endangered and threatened species is not physically or economically practicable. Therefore, some prioritization of recovery efforts is necessary within national fiscal constraints. The Act presupposes that there is a significant correlation between the protection of natural ecosystems and the conservation of endangered species. Such a correlation is unproven. Prior to making large investments in potentially expensive conservation efforts, such as land acquisition, other alternatives need to be considered.

STATE WATER LAW

Problem: Contrary to express Congressional intent, the Endangered Species Act has been used in the past to directly abrogate the supremacy of state water laws. For example, the Fish and Wildlife Service is presently using the Act in the Colorado River Basin to mandate instream flows, irrespective of the biological needs of endangered species.

Recommendation: The Western States Water Council strongly urges Congress to specifically address this growing tendency of federal agencies to use environmental statutes to abrogate states' water laws. The Act should be amended to expressly state that the Act will not be used to allocate water, but such allocation will be accomplished under state laws.

INTERAGENCY COOPERATION

FEDERAL AGENCY ACTIONS

Problem: The Act mandates preservation of endangered and threatened species irrespective of primary agency purposes. Such a flat inflexible mandate precludes achievement of a reasonable balance between the value of threatened and endangered species and other important national needs.

Recommendation: Section 7 should be amended to qualify the present mandate and provide that primary agency purposes be given more weight.

CONSULTATION

Problem: Current formal consultation procedures exclude direct state and other non-federal participation. While informal consultation has been established, it is inadequate. The consultation process has sometimes been used by the Fish and Wildlife Service to intimidate other interests into accepting unreasonable delays by threatening jeopardy opinions

Recommendations: The consultation process needs to be more clearly defined and restructured to provide direct input by non-federal interests directly affected by the relevant agency action. "Good faith" consultation should be more clearly defined. What constitutes initiation of formal consultation should be explicitly stated, and state or permit or license applicants should be allowed to directly request formal consultation.

JEOPARDY OPINION

Problem: The Secretary's opinion, rendered by the Fish and Wildlife Service, as to the potential jeopardy or lack thereof due to an agency's proposed actions, has been routinely delayed by automatic extension of the consultation process. When finally rendered, such opinions have sometimes in the past lacked factual content and have superficially addressed reasonable and prudent project alternatives.

Recommendations: The Secretary's opinion should be promptly delivered within the 90 day statutory limit, except as mutually agreed by the agencies and relevant non-federal interests, and should be based on the best existing and readily available information. The Opinion should not be delayed pending the outcome of any required biological assessment. Again, some forum should be established to provide for challenges to scientific and biological claims of the Fish and Wildlife Service, as well as lead to a resolution of the differences and determination of the facts. Lastly, the Act should be amended to specifically allow at this stage for the implementation of reasonable and prudent alternatives mutually agreed to as a means of mitigating project impacts on threatened or endangered species, and thereby avoid jeopardy.

BIOLOGICAL ASSESSMENTS

Problem: Biological assessments have suffered from the same problems as the jeopardy opinions. They are often unreasonably delayed, and professional judgments leave room for reasonable disagreement. Further, the Interior Solicitor's Office has stated that such assessments should include consideration of a project's cumulative effects, which are difficult to determine. The latter has been used by the Fish and Wildlife Service to justify the issuance, or threatened issuance, of a jeopardy opinion where project impacts are negligible and a scenario including cumulative impacts of all future projects has not been, and possibily cannot be, reasonably determined.

Recommendations: Again, some forum should be provided to allow for the resolution of differences in professional judgment. However, such assessments must be promptly completed within the six month statutory limit, and decisions must be made based on the information gathered. Adequate funding is important to the quality of such assessments, but where fiscal constraints preclude a totally comprehensive review, decisions must be made using the best readily available information. Review of a project's cumulative impacts, if appropriate, must be limited in scope and should not delay all development pending approval of an uncertain area-wide development scenario.

EXEMPTION PROCEDURE

Problem: It appears that the exemption process has not provided the flexibility and balance between environmental and economic values which Congress intended. To our knowledge only three projects have sought exemptions. The Grey Rocks project was approved with specific mitigating measures, the Tellico Dam project was disapproved for economic reasons (which disapproval Congress later overrode), and the Pittston Refinery project in Eastport, Maine is as yet unresolved. The exemption procedure is time consuming, cumbersome, imprecise and, rather than facilitate conflict resolution, may stonewall meaningful development.

Recommendations: Congress should explicitly state that consideration of exemptions should take place after meaningful consultation, within the statutory time period, has failed to resolve conflicts between the values established by the Act and project purposes. The exemptions should not be considered as a matter of last resort following protracted and meaningless discussion within a clouded context of differing interests, or after a particular project's compatibility with all other statutory requirements has been determined. Rather than delay decisions, the process should facilitate timely conflict resolution. To accomplish this objective the process needs to be more clearly defined and shortened to a reasonable period of time.